THE ROLE OF IMARATE SHARIA IN DEVELOPMENT OF MUSLIM PERSONAL LAW IN INDIA

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IN

LAW

By

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Certificate

I certify that the work of **Mr. Badre Alam Khan** on **"THE ROLE OF *IMARATE SHARIA* IN DEVELOPMENT OF MUSLIM PERSONAL LAW IN INDIA"** has been carried out under my supervision. It is upto date and original. He is allowed to submit his thesis for the consideration for the award of the degree of **Doctor of Philosophy in Law.**

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DEDICATED TO THE HUJJAJ OF 2000

ESP. MY PARENTS WHO NEVER FACED THE PROBLEMS IN PREVIOUS ASFAR OF HAJ.

فائدہ کیا فکر بیش وکم سے ہوگا

ہم کیا ہیں جو کوئی کام ہم سے ہوگا

جو کچھ ہوا، ہوا کرم سے تیرے

جو کچھ ہوگا ترے کرم سے ہوگا

اشرف علی تھانوی

"It is waste to think about materials I am nothing who can do anything. What is achieved is your gift. What will be achieved is based upon your mercy"

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هُوَ ٱللَّهُ ٱلَّذِى لَآ إِلَٰهَ إِلَّا هُوَ ۖ عَٰلِمُ ٱلْغَيْبِ وَٱلشَّهَٰدَةِ ۖ هُوَ ٱلرَّحْمَٰنُ ٱلرَّحِيمُ ﴿٢٢﴾ هُوَ ٱللَّهُ ٱلَّذِى لَآ إِلَٰهَ إِلَّا هُوَ ٱلْمَلِكُ ٱلْقُدُّوسُ ٱلسَّلَٰمُ ٱلْمُؤْمِنُ ٱلْمُهَيْمِنُ ٱلْعَزِيزُ ٱلْجَبَّارُ ٱلْمُتَكَبِّرُ ۚ سُبْحَٰنَ ٱللَّهِ عَمَّا يُشْرِكُونَ ﴿٢٣﴾ هُوَ ٱللَّهُ ٱلْخَٰلِقُ ٱلْبَارِئُ ٱلْمُصَوِّرُ ۖ لَهُ ٱلْأَسْمَآءُ ٱلْحُسْنَىٰ ۚ يُسَبِّحُ لَهُۥ مَا فِى ٱلسَّمَٰوَٰتِ وَٱلْأَرْضِ ۖ وَهُوَ ٱلْعَزِيزُ ٱلْحَكِيمُ ﴿٢٤﴾

"Allah is He, than whom
There is no other god; -
Who knows (all things)
Both secret and open;
He Most Gracious
Most Merciful
The sovereign, the Holy One,
The Source of Peace (and Perfection),
The Guardian of Faith,
The Preserver of Safety,
The Exalted in Might,
The Irresistable, the justly proud
Glory to Allah!
(High is He)
Above the partners

They attribute to Him
He is Allah, the Creator
The Originator,
The Fashioner
To Him belong
The Most Beautiful Names :
Whtever is in
The heavens and on earth.
Doth declare
His Praise and Glory
And He is the Exalted
In Might, the wise (S59A 22- 24).

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(BADRE ALAM KHAN)

ABBREVIATIONS

عقلمندرا اشارہ کافیست

"A word to the wise."

ABBREVIATIONS AND EXPLANATIONS

Abbreviations	Fullform	Explanation
A	Ayat	Sentence of the Holy Quran
AH	After Hijra	
AS	Alaihis Salam	Peace be upon him
CH	1 Chapter	
CH	2 Chaudhri	
Diss	Dissolution	
Dism.	Dismissed	
Rah	Rahmatullah Alaih	May Allah send his blessings
Raz	Raziallaho Tala- Anaho;	May Allah be happy with; him,
	Anha & Anhuma	her, both of them
S	1. Sura	The chapters of the Holy Quran
	2. Sections	
SLS	State Legal System	
SWT	Subhanaho Wa Tala	Who does not suffer from short coming and He is above all
V	1 Versus	
	2 Verse	Sentence of the Holy Quran

CONTENTS

INTRODUCTION

خشت اول چوں نهد معمار کج

تا ثریا می رود دیوار کج

"If first brick of the wall is placed

topsyturby, the wall cannot be

flat even if that reaches to the sky."

INTRODUCTION

There is uproar and unrest everywhere in the world. Every person looks dissatisfied. Persons feel that something is there which hinders their progress and attainment of satisfaction. In order to erase that hurdle, there is strike, protest, terrorism, rebellion and aggression. Since law is to regulate the human society, the persons connected with legal fields are under duty to regulate it properly. For this they have to come forward. Sometimes a lawyer will do something decent, despite opposition of the persons e.g. in 1955-56 a number of laws were enacted to reform Hindu Law. Although there was opposition from the groups but finally a bold step was taken. In the similar way the Dissolution of Muslim Marriage Act was passed in 1939 although a section of scholars (*Ulema*) were opposing. The Muslim Women (Protection of Rights on Divorce) Act was passed in 1986, despite the opposition of the majority community. Law not only be enacted to regulate the society but it must be suited to the subjects also. Law is made for man. Man is not made for law.

There is an institution in Bihar named Imarate Shria, Bihar and Orissa. Muslims who comprise of more than 15% population of India and are the largest minority, appreciate it. The legal system established by the aforesaid institution is used by the Muslims of other states also. In the year 1993[1] the Muslim Personal Law Board passed a resolution to adopt the Imarate Sharia way all over the India. In response to the resolution of Muslim Personal Law Board, the establishment of legal system came into existence everywhere. Now the question arises as to why Muslims, despite

their personal law, established the alternative legal system. Is it a step of destabilizing the established system? If not what is the cause? Muslim intellectuals conveyed the message that in order to develop, strengthen and implement the personal law they are doing this. So this research is offered with certain questions.

1. Is an Imarat needed for Muslims to lead the Islamic life?
2. Is Imarate Sharia a fit case to be cited as an example of Imarat?
3. Has Imarate Sharia done enormous works in developing, strengthening and implementing the Muslim Personal Law?
4. Are there provisions of alternative settlement in India?
5. Is Court fee charged in the Indian legal system excessive?
6. Has Imarate Sharia provided the alternative remedy?
7. Is the alternative, provided by Imarat, effective, less time consuming and upto the satisfaction of the persons concerned?
8. Is the institution of Quza necessary to dissolve the marriage?
9. Is the future of Imarate Sharia bright in India?

The present thesis has tried to discuss, analyse and answer the above questions.

Muslims are fully woven with their faith that includes three things- Monoism, Prophethood & Accountability.[2] According to their faith the Allah (SWT[3]) is creator of universe including human being, and His

[1] Secretariat of Board. 'Gyarahwan Ijlas, All India Muslim Personal Law Board, Karwai Aur Tajwiz' (Patna : Imarat Building) pp. 14-17. 28-29.

[2] One ness of Allah. Messengers and the Day of Judgment.

[3] They believe that Allah is Almighty and does not suffer from any weaknesses and He is the Greatest of all.

guidance is itself an authority of reasonableness. The act of the Prophet (SAW[4]) is in accordance with the guidance of Him.

Chapter one discusses the concept of Imarat and its place in sharia. The views of religious scholars, the qualifications of Ameer and the comparative study are also incorporated in this chapter. The Quran is believed to be Holy Book, being the wordings of Allah, which was revealed upon the Prophet (SAW) by the angel Gabrail.[5] There cannot be any alteration/adulteration in this Holy Book. If this book says that there is need of Imarat that is final. If a thing is not mentioned in the Holy Quran but the Prophet says to do, that is also a source of Islamic law. There are also some allied sources. So before saying that *Imarat* is necessary for Muslims one is to establish it through the Holy Quran, the Traditions, *Ijma* or by allied sources. The Holy Quran says -

"Follow Allah
And His Prophet
And those Charged
With authority amongst you."[6]

Thus the Holy Book guides to follow the *Ameer* which is not possible unless and until there is any *Ameer* or Incharge. The Tradition of the Prophet (SAW) is also quoted by Abdus Samad Rahmani that there should be one *Ameer.*[7] Where the Holy Quran and Hadith are unanimous there is no need to mention the other allied sources to establish its importance. Even then the history is relevant in Indian society. However the history is also witness of its importance. Right from the early age of Islam

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[4] Sallallaho Alihe Wasallam (SAW) i.e. Peace and Blessing be upon him. It is a pray, taught by Allah (SWT) to recite for the Prophet (SAW) holy Quran S-33. A-56

[5] It is a name of an Angel which is very close to Allah who brings the commandments of Allah to the Prophets.

[6] For detail see Quran and Institution of Imarat. Infra Chapter 2.

[7] For detail see Hadith and Institution of Imarat. Infra Chapter 2.

till this date no scholar has opposed its establishment.[8] It is also continuing in India in one-way or the other.[9] Arun Shourie has written a book namely '*World of Fatwas*' in which he has tried to establish that the *Ulema* are having much sway over the Muslim masses. In the case of *Imarat*, Shah Abdul Aziz had given fatwa which is as follows -

'When the governance of an area falls in the hands of non Muslims, the Muslims, became under obligation to elect any body as an *Ameer* amongst themselves; If there is any nominee made by the non Muslim King, he will be incharge of the tasks assigned to the *Ameer*. Where there is no nominee, Muslims have to elect any body who is the most righteous, who will be the incharge of *Juma* prayer, *nikah* of teenagers having no guardians, protection of the property of orphans, distribution of shares of inheritors who are fighting for their shares and all of this will be made without making any interference in the political affairs of the country'.

Shah Abdul Aziz further said:

"Delhi is no more governed by Muslims. Christians are dominating over here and they destroy the mosques. No body is free for visiting Delhi and the nearby places, without the permission of the Christians. The Government of the Christians is continued from Delhi to Calcutta. The India is just like *Bani Yarbua*, which was a non-Muslim country, in the Caliphate of Abu Bakr, where the performance of *Idain* and *Juma* etc was continued[10]."

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[8] For detail please see Historical development and Institution of Imarat. Infra Chapter 2.
[9] For detail please see Chapter 2
[10] Ibid

Not only the Muslims were demanding and trying to establish *Imarat* but also the Britishers were fully aware with this fact. W.W. Hunter had written in detail about this.

In this background one Mr. Abul Mahasin Sajjad founded Imarate Sharia in 1921 and functioning till date. Under its jurisdiction the State of Bihar, Orissa and some part of Bengal are given.

But the question arises whether it is a legal entity. Has its established system been treated as an alternative remedy? Moreover is there provision of alternative settlement in our system? When these questions are raised one will reach at the conclusion after long discussion of law as well as fact.

Chapter two consists of the concept of alternative settlement. Historical background of alternative legal system, its validity and practicability of the alternative in Indian system is also discussed. In ancient India there was alternative system.[11] Right from the age of *Shastras* down to the Rajputs there was provision of alternative system. In the medieval period no abolition of this system could be possible. Not only Khalji dynasty, Slave dynasty and Tughlaq dynasty but the entire *Sultanat* period including Mughals and Shivaji have provided the alternative remedies. Thus we see that the history of alternative remedy is dignified. The Britishers to some extent unified the judicial system but the village folk were still playing a dominant role in settling the issues. Prem Chand in his famous book *Mansarovar*[12] has written a story entitled 'Panchayat' is evidence of this fact.

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[11] For detail please see Chapter 3 infra.

[12] Munshi Prem Chand 'Mansarovar' (Urdu) (Delhi : Diamond Pub.1993) VI, p. 145.

Apart from this the alternative system is recommended due to adversarial system and reactive mobilization of Indian legal system. In reactive mobilization the subjects are to initiate the legal proceedings. The time taking process of our system is another ground of its recommendation. The delay may be caused by executive, mismanagement of the Court work or due to bar. Ultimately that hampers the judicial work. The Court Fee system is another cause of the demand of alternative remedies. The critics say that the fee charged from the poor litigants is not only enough to meet the judicial expenses but it is appropriated in general revenue also. From its very inception even Lord McCauley, the Britisher, has severely criticised it. The law commissions have also advised to reconsider this system.[13] Some others criticise that this system is developed by the colonial lords for their subjects. It is the irony of the fate that we are embracing a system of Colonial Masters although we have rejected them. Even the independence of judiciary is doubted. The former S.C.Judge Justice V.R. Krishna Iyer writes much about this in his book 'Justice at the Cross Roads'. The demand of the public may also not be denied. There is persistent demand of alternative system. Moreover, the constitution, which is, treated supreme in India talks about alternative. Article 40 says - "The state shall take steps to *organise village panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government."

Here the organisation of village panchayat is nothing but an alternative remedy. The organisations of Lok Adalats are also the alternative provisions. The Arbitration and Conciliation Act is also of same effect.

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[13] Esp. 14th law commissions Report please see Chapter 3 *infra*.

At international level, the alternative system is adopted with regard to the commercial transaction. The UN has passed a model code, which is known as UN CITRAL model rule to which most of the countries have ratified and modified their laws in conformity with that code including India. The courts themselves are encouraging the alternative [illegible] provisions to the affected persons. In *Jamal Ahmad Siddiqui* V. *A.M.U.* (20282 of 1999), *Zakir* V. *A.M.U.* (3118 of 1992), *Hashim Ali Khan* V. *A.M.U.* (41481 of 1999). *Dr. Mohd. Zulkefle* V. *A.M.U.* (44601 of 1999), *S. Nazeer Mehdi* V. *A.M.U.* (41482 of 1999), *Dr. An wer Alam* V. *A.M.U.* (37654 of 1999) and *Ms Raihan Raza* V. *A.M.U.* (38841 of 1997) the Allahabad High Court has held that in presence of the alternative remedy, the High Court need not be approached.

Since the study is confined to the working of Imarate Sharia Bihar the view of Imarat, regarding marriage, dower, divorce and dissolution is to be minutely observed and analysed.

Chapter three talks about marriage and view of Imarate Sharia. Marriage is the union of two opposite sexes, which is the necessary incident of Islam. The Holy Quran says:

وَأَنكِحُوا۟ ٱلْأَيَـٰمَىٰ مِنكُمْ وَٱلصَّـٰلِحِينَ مِنْ عِبَادِكُمْ وَإِمَآئِكُمْ ۚ إِن
يَكُونُوا۟ فُقَرَآءَ يُغْنِهِمُ ٱللَّهُ مِن فَضْلِهِۦ ۗ وَٱللَّهُ وَٰسِعٌ عَلِيمٌ ﴿٣٢﴾

"And marry such of you as are solitary and the pious of your - selves and maid servants. If they be poor Allah will enrich them of His bounty. Allah is of ample means, aware."[14]

[14] M.M.Pickthall,Holy Quran'S 24 A 32

He further revealed,

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانْكِحُوا مَا طَابَ لَكُم مِّنَ النِّسَاءِ

"And if ye fear that ye will not deal fairly by the Orphans, marry of the women, who seem good to you."[15]

The Traditions of the Prophet (SAW) also show the importance of the marriage.Prophet has said -

"There are three persons whom the Almighty Allah himself has undertaken to help, first he who seeks but his freedom, second, he who marries....."

It is also said that there is no act of devotion that has remained prescribed for us, since the time of Adam (AS) up to this moment and will be continued in paradise except marriage and faith[16].

The nature of the marriage is of a sale or ordinary contract will be discussed. How-ever the Holy Quran has termed this contract as pious one.

Chapter fourth contains the concept of dower and view of Imarate Sharia. In this chapter a discussion on dower debt is incorporated. In the matter of quantum of dower there is difference of opinion amongst the scholars. According to some,it may be fixed but according to others it may not be so. Thus the divergence of opinion about the amount of dower is also worth discussion which has been made and all the views including

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[15] Ibid A.3

[16]. Darrul Mukhtar. Trans B. M. Dayal (N.Delhi: Kitab Bhawan. 1992.) II. p. 12.

the opinion of Imarate Sharia has been discussed and analysed at appropriate place.[17] The deferred and prompt dowers are also picked-up for discussion. The term dower debt is also very common and Imarate Sharia has often used this term. So the same will be examined at its appropriate place

This chapter also contains the concept of divorce and view of Imarate Sharia. In this chapter a discussions on *talqul bidai* is incorporated. Though the divorce is most abhorred act in Sharia but at the same time it is the most burning topic of Muslim Personal Law. The right of divorce is given to the husband. The use of husband's right whether checked or not is complex question. The question why women are not provided this right? will be dis However they have been given the right of *Khula.* The legislation in India also provides them certain grounds for dissolution of the marriage. Imarate Sharia is at par in this and it provides more grounds than that of the D.M.M. Act 1939. One more interesting topic is divorce. Whether triple divorce is valid divorce or not. There is legislation to this effect in several countries. So a thorough discussion has been made about that.

Chapter fifth and sixth consist of grounds for dissolution of marriage. The scholars suggest several grounds for dissolution of marriage but Imarate Sharia follows the following grounds[18].

Untraceability is ground of dissolution of marriage. Some scholars suggest very tough conditions to dissolve the marriage on this ground while others are comparatively very lenient. The Imarat has further

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[17] For detail see chapter infra.

[18] 1.Untraceability.2. Inability of the husband to maintain the wife. 3. The neglect of the husband. 4. Impotence of the husband. 5. Insanity. 6. Virulent and Venereal diseases.6. Kafat.7. Option of puberty.8. The enmity between the spouses .9. Cruelty. 10. Mustakhirat

eased it and with the help of other grounds the marriage is dissolved without fulfilling the tough and lenient conditions i.e. of 70-80 years waiting or 4 years waiting after applying to the Qazi.

On the ground of inability of the husband to maintain the wife the different opinions are there. However Imarate Sharia has adopted the opinion of those scholars who are in favour of dissolution. But why it is so? It will be discussed. The neglect of the husband is another ground of the dissolution. The Indian legislation provides 2 years time for it but Imarate Sharia is of the view that even in lesser time the marriage may be dissolved provided the situation is grim. Regarding the impotence of the husband, the wife has right of dissolution. However the opinion of the scholars about the consent of the wife and opinion in the same sitting is not followed practically. Inspite of it that wife has consented the marriage; she can get the dissolution effected. In the similar way the insanity also occasions for dissolution. Although the opinions of the scholars are divided, the Imarat has adopted the liberal view favouring dissolution.

Virulent and Venereal diseases are another ground of dissolution of marriage. There are certain diseases, which ail. others. In such circumstances if a wife wants not to live with her husband, despite the morality does not allow it, she has legal right to get the marriage dissolved. In this matter the Imarat has adopted the views of Imam Mohammad and other scholars of Sunni School. One more ground of dissolution of marriage is *Kafat.* Where the wife comes from the higher order may face the problems if forced to adjust in a lower order. But Imarate Sharia does not accept this ground for lineage saying in non-Arab territory there is no option of *kafat* on lineage. In the matter of option of puberty a wife should

have right to correct the mistakes of her guardians. However it is seen that the marriage made by the father and grandfather held valid despite that the wife opts her option to repudiate it. One interesting topic in dissolution is physical contact. The Shafeyees have taken a liberal view while the Hanifis have taken a tough stand. However after discussion it will be commented whether seeing with lust may occasion prohibition and marriage should be considered dissolved. About the cruelty some scholars have taken the tough stand. They say that even once beating to the wife may occasion dissolution. While others have adopted a liberal view. However it would be better to adopt a way in between two. The enmity between the spouses will also occasion the dissolution. It is a natural phenomenon that the person who is aggrieved with other will see him with doubt and to live with him becomes impossible. So there is no alternative other than the dissolution.

Chapter seventh talks about the working of Shariat Court under Imarate Sharia, The best way of comparing with the Regular Courts is to see the time, money, expenditure, appeal and implementation of the decisions. For this the cases decided by the Imarat Sharia and Patna High Court are to be compared.It is also to be discussed here whether Muslims are under duty to opt Shariat Court.

Chapter eighth talks about the future of Imarate Sharia .To see the future of Imarate Sharia, the works done by the Imarate Sharia is to be minutely observed. What services Imarat has done in the past? How it is serving the society in the present day scenario? What has it planned in the future? and moreover what is its image in the different segments of the society? On the basis of the study it will be seen as to what role has been played by Imarat in developing and strengthening of Muslim Personal Law.

Chapter nine analyses the role of Imarate Sharia in developing and strengthening the Muslim Personal law. An important question is also to be discussed here i.e. is Imarate Sharia a real Imarat or not?

Before appendix, there is **conclusion,** which consists of the inference of the study. On the basis of which some suggestions have been made which may be treated as crux of the study.

In the last the **appendix** is attached which consists of the cases of the Imarate Sharia published in the various magazines and list of the cases opted for the study. The questionnaire used in the survey along with the legislations made in the various countries, concerning personal law is also incorporated here.

CH-1: THE INSTITUTION OF IMARAT IN HISTORICAL PERSPECTIVE

1. INTRODUCTION:

This chapter deals with the historical perspective of Imarate Sharia. Before that it is necessary to know the meaning and place in Quran and Hadith of *Imarat*. The view of the religious leaders about *Ameer* and his qualifications are also incorporated here. The historical developments of the institution of *Imarat* and practical aspect of Imarate Sharia (Bihar & Orissa) will also be discussed in this chapter.

2.THE HOLY QURAN AND INSTITUTION OF *IMARAT:*

It is the basic principle of Islam that it emphasises unity of *Ummat* and discourages disunity. Allah has revealed[1]-

وَٱعْتَصِمُواْ بِحَبْلِ ٱللَّهِ جَمِيعًا وَلَا تَفَرَّقُواْ ۚ وَٱذْكُرُواْ نِعْمَتَ ٱللَّهِ عَلَيْكُمْ إِذْ كُنتُمْ أَعْدَآءً فَأَلَّفَ بَيْنَ قُلُوبِكُمْ فَأَصْبَحْتُم بِنِعْمَتِهِۦٓ إِخْوَٰنًا وَكُنتُمْ عَلَىٰ شَفَا حُفْرَةٍ مِّنَ ٱلنَّارِ فَأَنقَذَكُم مِّنْهَا ۗ كَذَٰلِكَ يُبَيِّنُ ٱللَّهُ لَكُمْ ءَايَٰتِهِۦ لَعَلَّكُمْ تَهْتَدُونَ

"And hold fast,

[1] Holy Quran S 3 A 103

CHAPTER-1

HISTORICAL PERSPECTIVE

"A Lawyer without History or literature is a machine, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

Scott Guy Mannering

All together, by the rope
Which Allah (stitches out
For you). And be not divided
Among your selves,..."

Again:

وَلَا تَكُونُوا۟ كَٱلَّذِينَ تَفَرَّقُوا۟

وَٱخْتَلَفُوا۟ مِنۢ بَعْدِ مَا جَآءَهُمُ ٱلْبَيِّنَٰتُ ۚ وَأُو۟لَٰٓئِكَ لَهُمْ عَذَابٌ عَظِيمٌ ﴿١٠٥﴾

"Be not like those
Who are divided
Amongst them selves
And fall into disputations
After receiving
Clear signs:..."[2]

After keeping the foundation stone of *Imarat* Allah commands-

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓا۟ أَطِيعُوا۟ ٱللَّهَ وَأَطِيعُوا۟ ٱلرَّسُولَ وَأُو۟لِى ٱلْأَمْرِ مِنكُمْ ۖ
فَإِن تَنَٰزَعْتُمْ فِى شَىْءٍ فَرُدُّوهُ إِلَى ٱللَّهِ وَٱلرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِٱللَّهِ
وَٱلْيَوْمِ ٱلْءَاخِرِ ۚ ذَٰلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا ﴿٥٩﴾

"O,Ye who believe
Obey Allah, and obey the Messenger,
And those charged
With authority among you".[3]

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[2] Ibid S3A105

[3] "If you differ in any thing
Among yourselves, refer it
To Allah and his Messenger,
If you do believe in Allah
And the last day:
That is best, and most suitable

In this verse Allah commands to follow the *Ameer*, which is not possible without the institution of *Imarat*. Thus the establishment is inevitable as for as the institution of *Imarat* is concerned.

3. THE TRADITIONS (*HADITH*) AND INSTITUTION OF IMARAT:

In Tradition (*Hadith*), a catena of cases are there where the Prophet(SAW) has told in express words about the institution of *Imarat*. One companion of the Prophet (SAW) said, "O Prophet (SAW) my father is an old man; he is the chief of the people living at the water. He has requested you to appoint me as chief after him." He{Prophet (SAW)} replied: " The office of a chief is necessary and people must have chiefs..."[4]

From this *Hadith* we can deduct that *Imarat* is essential for Muslim community. Again :

"One who follows *Ameer* follows me(the Prophet) and one who disobeys the *Ameer* ,defies my order(of the prophet)".[5]

Again:

"Muslims are under duty to hear and follow the *Ameer* unless he order for sin"[6]

For final determination."
(The Holy Quran S4A59)
But there is limitation in the obedience. In a Tradition (Hadith) it is said that no obedience of any human being is permissible in the defiance of Allah (creator).In this *ayat* it has been guided that in case of difference one must refer the matter to the original and primary sources of Islamic law.

[4] Prof. Ahmad Hasan 'Sunan Abu Daud' (Delhi: Kitab Bhavan, 1985) Vol. II p. 825

[5] Bukhari(Arabic)(Delhi:K.K.Rashidia,1375AH)II,1057

"One must not spend either a day or a night but with *Ameer* if it is possible to choose one[7]."

Again :

"Where there are three persons in a journey, they must choose one as an *Ameer* amongst themselves".[8]

The *Hadith* quoted by Ahmad bin Hambal (Rah) may also be cited where it is said-

" It is not permitted for the persons, residing on any part of the earth, where their number is three but they choose one as *Ameer* amongst themselves[9]."

The above *Ahadith* make the matter clear about the institution of *Imarat*. Now no body can take the plea of majority- minority problem. At one place apostle of Allah has told-

'The *Ameer* is shield and in his shadow expedition is led. It is he who provide the protection[10] '. In this *Hadith* the important things are told to be finished by the head. Where the head (*Ameer*) is not available the fighting battle should be avoided because of lack of leadership and command it may result into defeat. *Jame Ibne Abdul Bir* reports the saying

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[6] Ibid.It is also reported by Ahmad bin Hambal that Prophet said "I order for five things which Allah has commanded-1)To be united. 2)To hear the Ameer. 3)To follow the Ameer. 4)To be ready for migration. 5)Tomake jehad.

[7]. Abdus Samad Rehmani 'Hindustan Aour Masalae *Imarat*' (Patan : Maktabe *Imarat*, 1999) p. 51.
[8] Ibid. p. 52
[9] Ibid. p. 57

[10] Where there is no *Imarat* there is high chance of chaos, disorder and mismanagement, as no body is there to lead them. So the abolition of *Imarat* also creates the law and order problem rather than to make the Muslim masses enslaved or ruled.

of Caliph Umar (Raz) that there cannot be an Islamic life without collective life. There cannot be collective life without head (*Ameer*). He further says that it is also a fact that the foundation of *Imarat* is laid on obedience . Meaning there-by that in order to be a true Muslim or in order to lead an Islamic life, one is to establish the institution of *Imarat*. This thing is clearer by another *Hadith*[11], which says that the Muslims are ordered for five things which are commanded by Allah. Ist collective lives, 2nd hearing of commandment, 3rd follow the commandment 4th renunciation of worldly things for immigration, 5th fighting for the sake of Allah. The Muslim who is just one span away from collective life removes the necklace of Islam from his neck. One who destroys the collective life by any means his shelter will be hell. Sahaba, asked "O Apostle of Allah if he keeps fast, performs *Salat* then?" Replied the apostle that inspite of his performance of *Salat* and keeping fast and he being considered by the people as Muslim.

In this *Hadith* an important aspect of *Imarat* is explained. Naturally one cannot follow the command in the absence of a commander or leader i.e. *Ameer*. So the *Imarat* is inevitable.

4.RELIGIOUS ELDERS AND INSTITUTION OF *IMARAT*:

Caliph Umar (Raz) says –

"There can not be an Islamic life without collective life. There cannot be a collective life without the institution of *Imarat*. And this is a fact that the foundation of *Imarat* is laid on obedience[12] ."

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[11] Rehmani p 7.

[12] Ibid. p. 51

It is said that Umar (Raz) was the most knowledgeable person of his time. It is he who suggested for *Azan* and veil for women. At many places Almighty Allah has appreciated his suggestions and verses were revealed in concurrence of his opinion. One must know that Prophet (SAW) himself told that if there was chance of continuity of Prophet hood (which is not possible) it was Umar(Raz) who would have.

Ali (Raz) the 4th Caliph says that guidance is not possible without *Ameer*. It is immaterial whether he is righteous or astray[13]. Allama Tahavi says that where there is no Muslim governance the Muslims become under obligation to choose one of them as an *Ameer*[14].

Bahruraiq a famous book of Hanafi School also contains the similar view. *Raddul Mukhtar* contains the view that *Ameer* is necessary either through election by Muslims or nominated by the non- Muslim head of the state.

Allama Ibne Taimia in *Akhtiyarat* writes[15] that apostle of Allah has made it necessary to select a person as *Ameer* even for journey. This order is a guideline for every type of gathering as well as residential areas. Thus to choose one of them as *Ameer* is essential.

Allama Ibne Hajar Asqalani says,[16]"when any territory is left by *Ameer* due to its remoteness or the defiance of the orders of *Ameer*, the residents are under obligation to select any one of them as *Ameer*. If they fail to do so there will be irreparable damage"

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[13] Ibid. p. 51
[14] Ibid. p. 65
[15] Ibid. pp. 71-78

Allama Lakhmi Maliki says[17] that people are duty bound to select one from amongst themselves as *Ameer* because it is included in enjoining what is right and forbidding what is wrong.

Allama Abul Hasan Asbahi Shafeyee also has the similar view. Shah Abdul Aziz and Abdul Hai of Lucknow have also issued the similar *fatwas* about the *Imarat.*

Thus it can be, said that the scholars are unanimous on this point that there must be an *Ameer* which is a part of Islamic tenets. This view exists from the very beginning. Till now no scholar has dissented from this opinion, that is enough to prove its necessity.

This is also clear that the *Ameer* will be chosen from the people having influence and knowledge (*Ahlul HallWal Aqd*)

Qazi Jamaluddin bin Zaheer was of the opinion that the place where no *Ameer* is functioning it is the responsibility of the knowledgeable and religious persons (Ahlul Hall Wal Aqd) to appoint one as *Ameer*[18].

For institution of *Imarat* there is a *Hadith* of Abdullah Ibne Umar(Raz) that when there are three persons they are to choose one as *Ameer. Masnade Buzzar* (a famouns *Hadith* book) reports the sayings of Caliph Umar(Raz) that in journey where there are three persons they must chose one of them as *Ameer. Tibrani* also reports from Abdullah bin Masood about its necessity. Abu Daud quotes its inevitability from Abu Sayeed and Abu Huraira. When this *Imarat* is necessary in the journey and at all those places where the number is three, then for the persons residing

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[16] Ibid. p. 78
[17] Ibid. p. 79

either in the villages or in the cities are duty bound to select any body as *Ameer*.

5.HISTORICAL DEVELOPMENT AND INSTITUTION OF *IMARAT:*

There is clear–cut commandment of Allah to follow the instruction of *Ameer*[19]. The *Hadith* also contains the sayings of the Prophet (SAW) and his companions regarding the importance of *Ameer*[20]. So Muslims treat the institution of *Imarat* as the most important institution. That is why the election of *Ameer* was made soon after the death of Prophet (SAW). Although the dead body of the Prophet (SAW) was not kept in the grave the institution of *Imarat* was filled-up and Abu Bakar was elected as first Caliph. For the first time this institution was without its head and that is when Caliph Mustarshid was captured by Masood Saljuqui in 529 AH. Ibne Kaseer says that when Caliph Mustarshid was captured people of Baghdad were shocked. Public entered to the mosque and even broken the pulpit. Persons were not bothered for holding congregations in Mosque and expressed their resentment by making violent protests against the capture of their *Ameer*. Women were seen without scarf. The other areas followed the similar path of Baghdad. On this Malik Sanjar, the uncle of King Masood advised him to reinstate the Caliph and the Caliph was reinstated[21]. It seems that the situation of civil war was there due to absence of *Ameer*.

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[18] Ibid. p. 80
[19] Supra note – 3
[20] Supra notes 5–10

In India the Ist move in this direction was made in the time of Syed Ahmad Shaheed. After much consultation on 11th January 1827 Syed Ahmad Shaheed was declared as *Ameer*. But his martyrdom in 1831 made the Muslims to think about *Ameer*[22]. The country was ruled by Britishers. The Mughal Emperor Shah Alam 2nd was attacked by Lord Lake and was forced to made a treaty –

"Shah Alam's jurisdiction will be up to Delhi and the rest of the country will be governed by Britishers. From now the Muslims will be protected by East India Company only[23]".

Having seen the developments, Shah Abdul Aziz issued religious decree (fatwa) about the institution of *Imarat*. He said[24]

"When the governance of an area falls in the hands of non Muslims, the Muslims, became under obligation to elect any body as an *Ameer* amongst themselves. If there is any nominee made by the non Muslim King, he will be incharge of the tasks assigned to the *Ameer*. Where there is no nominee, Muslims have to elect any body who is the most righteous, who will be the incharge of *Juma* prayer, *nikah* of teenagers having no guardians, protection of the property of orphans, distribution of shares of inheritors who are fighting for their shares and all of those will be made without making any interference in the political affairs of the country".

Shah Abdul Aziz further said –

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[21] Miftahi p. 17
[22] Ibid. p. 31
[22] Ibid. p. 36
[23] Ibid.

"Delhi is no more governed by Muslims. Christians are dominating over here and they destroy the mosques. No body is free for visiting Delhi and the nearby places, without the permission of the Christians. The Government of the Christians is continued from Delhi to Calcutta. The India is just like Bani Yarbua, which was a non-Muslim country, in the Caliphate of Abu Bakar, where the performance of *Idain* and *Juma* etc was continued[25]."

Raddul Mukhtar also contains the similar decree[26]. So one can imagine that how the religious personalities were anxious at non establishment of the institution of *Imarat*. Any way it is said that in 1803 when the Britishers took the governance in their hands they promised to give full protection to Muslim law.Muslims were said to be free to refer their cases to the Qazis. But after 1857 Muslims were massacred and were deprived of their rights in every field like social, commercial etc. But the most important deprivation was the abolition of Quza system. There was no way to follow *Sharia* principle in those days. W.W. Hunter comments as follows.

"One charge yet remains. The Mohammedans complain that not only has our system extruded them from the legal profession but also that by an act of the legislature, we have deprived them of the one essential functionary for the fulfillment of their domestic and religious law. Under Mohammadan Government, the Qazi unites many of the functions of a criminal, a civil and an accelestastical judge. It was to him that we chiefly

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[24] Shah Abdul Aziz, 'Fatawa Azizia' Vol. V pp. 16 – 32
[25] Ibid
[26] Ibid. Vol. IV p 427.

trusted to carry on the administration of justice when we first took charge of the country. Indeed so indispensable is the Qazi to the Mohammadan domestic and religious code, that the law decided that India would continue a Country of Islam so long as the Qazis were maintained and become a country of the Enemy the moment they were abolished[27]."

Thus the continuance of the Quza system can change the entire nature of the State. The civil servant[28] of Her Majesty of Bengal further says.

"During the past seven years, a great and constantly increasing section of the Mohammadan community have been deprived of the functionary necessary for the celebration of marriages and other important ceremonies of their domestic code. The evil did not tell as first so severely as after-wards. for the old Qazi remained; it was only on the death or retirement of one of them that the law took effect by having abolished the machinery for filling his place. The subject early attracted the attention of the present Viceroy, but no absolutely conclusive evidence could be obtained until in 1870 when the Madras High Court took up and decided the question. Mr. Justice Collett's decision[29] leaves no doubt that Qazis can only be appointed by the ruling Power, that in default of such appointment the Muhammadans are powerless to elect one of themselves; and that the Act of 1864 has deprived their community of the most important offices of their law[30]"

Thus the situation of those days is clear by the 'Fatwa' of Abdul Aziz and comment of Hunter. It seems that Muslims were anxious about

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[27] W. W. Hunter 'The Indian Musalman' (1969 originally in 1871) pp. 183 – 184
[28] Ibid.
[29] Ibid. (*M. Abu Bakar V. M G Husain*)

Ameer. The religious personalities who could not dare to do anything in the reign of Muslim Kings fully exploited the issue of abolition of Quza system. So after the consultation, the *Ulema* chose Syed Ahmad Shaheed as Ameer.

After the martyrdom of Syed Ahmad Shaheed Mr. Wilayat Ali Sadiq puri was elected as Ameer, who also died in 1852 and succeeded in *Amarat* by his brother Inayat Ali. But the laters were unable to effectively run the institution of *Imarat* to which Ali Mian says that after Syed Ahmad Shaheed these institutions were not more than historical facts[31].

There was fighting between Britishers and Indians. The religious leaders (*Ulema*) were active participants of the fighting. So they chose Haji Imdad Ullah, Mahajir Makki as *Ameer*. A writer says—

"These (*Ulema*) reached Imdadullah and submitted, "It is difficult to fight without head. Since you are religious head, you are requested to look after our worldly affairs also. Being *Ameerul Mumenin* you decide our litigation. Haji could not reject the offer made by scholars and *Ulema* including Rasheed Ahmad and Qasim Nanotvi."[32] Husain Ahmad Madani says that Qasim Nanotvi was assigned the task to lead the army and Rasheed Ahmad Gangohi was made chief Qazi[33]

After the mutiny of 1857 Britishers were fully empowered as they captured the Delhi and thus the chief nominal head of India was sacked. As the mutiny was unsuccessful, Haji Imdadullah was forced to

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[30] Infra note – 45
[31] Miftahi, 'Imarat Sharia' p. 21
[32] Tazkiratur Rasheed Vol. II P 74.
[33] Naqshe Hayat p. 42

leave India. Rashid Ahmad was arrrested and kept in Jail. He was penalized for six months jail.

After this *Shaikhul Hadith* Mahmudul Hasan was assigned this responsibility (d. 1920). Although he was not declared as *Ameer*, the *Ulema* treated him as Ameer. He was also arrested and was sent to Malta.

It is said that there was propagation of nationalism all over the world. Persons were thinking about the territorial demarcations. So *Ulema* were anxious due to this also lest there should be demarcation of territory in the community. Perhaps it was this thinking of *Ulema* which compelled Allama Iqbal to write.

" CHIN O ARAB HAMARA, HIDUSTAN HAMARA
MUSLIM HAIN HUM WATAN HAI, SARA JAHAN HAMARA."

It is clear that *Ulema* were much anxious about *Imarat*[34]. Which was fouded at least in Bihar in the direct care of Maulana Azad as it is clear from the fact that the first meeting was held in the presidentship of Maulana Azad. A.M. Sajjad met Azad during the period of his internment in Ranchi Jail and he was also convinced about the need of an *Ameer*. A.M. Sajjad transformed this idea into practical shape in the Bihar province.

A.M. Sajjad- "Born[35] in Pehnasa, a village in the Nalanda area. Sajjad had been to various madarsas in Bihar and to Deoband for a while, before joining the Madarsa Anwarul Uloom at Gaya as head mudarris (teacher). It was in Gaya that he called a meeting of the *Ulema*

[34] But Maulana Azad was thinking to be himself the Imam of India. {The Indian Economic and Social History Review 34, Vol. I (1997) p 2}. But it does not corroborated by the evidence and seems as his opinion.
[35] Ibid.

(theologians) in June 1918, which founded the *Anjuman Ulemae Bihar.* Soon after this, Sajjad toured throughout India, emphasising the need for an all-India organisation of the *Ulema.*"

Papiya Ghosh a columnist of Indian Institute of Advanced Studies writes:

"A month later the Bihar (Jamiat *Ulemae* Hind (JUH) met in Patna on 25-26 June 1921 and in the presence of Maulana Azad decided on Shah Badruddin of the Chistia Sabireya Silsila (order) and of the Mujibia Khanqah, Phulwari, as the provincial *Ameer.* Given his reluctance to leave his hospice, Sajjad was appointed his deputy, *Naib Ameer,* to see the actual organisation of the Imarate Sharia[36]"

The inception of *Anjuman Ulemae* Bihar is important in this sense also that it is founded prior to the *Jamiate Ulemae Hind* and *Khelafat* Committee[37]. After the foundation of the *Anjuman,* A.M. Sajjad visited the leading relegious presonalitites. He talked in detail with Qayamuddin Mohammad Abdul Bari of Farangi Mahal, Lucknow, popularly known as Abdul Bari Farangi Mahli. A meeting of *Ulema* was called in Delhi. A.M. Sajjad delivered a lecture which resulted into the foundation of *Jamiate Ulemae Hind(JUH).* Ahmad Sayeed of Delhi, the Ist Nazim of JUH writes:

"In this way Maulana Sajjad was successful in making the *Ulema* aware about *Imarat* and unity. Soon after this,there was discussion about *Khilafat Committee* all over India. The need of *Imam* of Muslims was felt and a religious decree was published by the signature of leading *Ulema*

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[36] Ibid. p. 3
[37] 'Imarate Sharia 'Dini Jaddo Jehad ka Roshan Bab' (1981) p. 52

including A.M. Sajjad. He repeatedly stressed about establishment of Imarate Sharia all over India[38]."

In 1921 there was meeting of JUB at Darbhanga in which it was decided that there will be an *Ameer*, who shall be well versed in religious affairs,whose order will be binding upon Muslims. A reception committee was founded which decided that A.K. Azad should be the president of the conference where the process of election of *Ameer* was to be completed. For its success A.M. Sajjad dispatched a letter to the *Ulema* of Bihar. He wrote, 'every body having religious knowledge know that in case of subjugation of Muslim governance, Muslims are under obligation to establish *Imarat*. So that they can lead the religious life. After 150 years, Muslims are unable to do this work due to differences and unawareness. The result of this is very hazardous as they are leading the life of ignorance inspite of their righteousness. This conception must be over thrown. Every person has considered the individual act of piousness as a way of success. It is a renunciation of world(*rahbaniyat*). It is not proper to say that *Ameer* will be chosen only when he will be like Caliph Umar(Raz).'

He further wrote that it is useless to talk about petty differences among Muslims. It is from the beginning but it never caused to leave the obligatory things. It is also not true that the powers of *Ameer* will be unlimited and he will force the people to follow his way. *Ameer* will be having limited rights i.e.

1. He will implement only those things, which have been decided unanimously by the *Ulema*.

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[38] Ibid p. 56

2. He will not have concern with petty matters of difference amongst Muslims. He may not forbid to talk about difference of opinion of *Ulema* in religious matters. However he will not allow the quarrel among Muslims.

3. The orders issued by the *Ameer* will not be binding upon each and every Muslim. If any body reaches upon different conclusion than what the *Ameer* has ordered he will not be bound to follow *Ameer*.

The qualification of *Ameere Shariat* will be as follow[39]

1. The *Ameer* must be practical Muslim having Islamic Knowledge. He should have capability to issue religious decree. He must be counted with leading religious personalities and having a considerable support of Muslims.

2. He must be fore-sighted, and unhesitant in telling truth. Worldly things must not influence him.

3. He must be able to give advice in challenging matters of present time. He must not be careless and egoistic.

The letter shows that there was general wish to establish *Imarat*. But due to differences amongst Muslims, it was not possible. A.M. Sajjad by his letter won the confidence of *Ulema* and the meeting was held in the president ship of A.K. Azad who delivered his two hours lecture. After that Mohammad Badruddin was chosen as Ameer and A.M. Sajjad as Vice Ameer. The Ist statement of *Ameere Shariat* also shows the differences of *Ulema* and the need of the *Imarat*.

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[39] Ibid. pp. 70 -74

In his fist speech as *Ameer* Mohammad *Badruddin said-*

"Each and every one should know that in this age of uncertainty the most important thing which we have been given is establishment of *Imarat*. If you consider its importance and resolve to follow *Ameer*, all of your problems will be solved in a while. Muslims as a whole should know the purpose of *Imarat*. To serve and to protect Islam and to establish the honour of religion it is a must, which is not possible without unity. So I shall issue such orders, which will concern Muslims as a whole and will not be against any denomination of Islam.

Today I accept the Challenges of the added responsibilities. It will be my obligation to oust every pain of Muslims [40]"

"Mohammad Badruddin"

20.10.1339 A.H.

But the question arises as to what will be the qualification of *Ameer*. It may be described in the following head.

(1) QUALIFICATIONS OF *AMEER*:

It is said that *Ameer* is not dictator. It is believed that he is servant and deputy (naib) of the Supreme Authority. Ibne Taimia says that there are two requirements of deputy-ship (wilayat/niabat). One is strength and other is trust. The strength is necessary so that the *Ameer* can get the orders implemented. With knowledge he will be fearful to the Almighty

[40] Ibid. pp. 80 – 81

Allah and in this way he can not misuse the commandment of Allah[41]. This thing is taken from the Holy Quran which says-

قَالَتْ إِحْدَىٰهُمَا يَٰٓأَبَتِ ٱسْتَـْٔجِرْهُ ۖ إِنَّ خَيْرَ مَنِ ٱسْتَـْٔجَرْتَ ٱلْقَوِىُّ ٱلْأَمِينُ

".. truly the best of man
for thee to employ is
The (man) who is
strong and trustee[42] "

However the office of the *Ameer* is the highest employment. The strength in the above mentioned verse does not mean the means of strength. It means the strength of will and determination. Because in case of means of strength, Prophet Musa (AS) was not in possession of that[43]. However

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[41] Rehmani'Maslae Imarat p. 20
[42] S 28 A 26 Holly Quran.
[43]

وَجَآءَ رَجُلٌ مِّنْ أَقْصَا ٱلْمَدِينَةِ يَسْعَىٰ قَالَ يَٰمُوسَىٰٓ إِنَّ ٱلْمَلَأَ يَأْتَمِرُونَ بِكَ
لِيَقْتُلُوكَ فَٱخْرُجْ إِنِّى لَكَ مِنَ ٱلنَّٰصِحِينَ ﴿٢٠﴾ فَخَرَجَ مِنْهَا خَآئِفًا
يَتَرَقَّبُ ۖ قَالَ رَبِّ نَجِّنِى مِنَ ٱلْقَوْمِ ٱلظَّٰلِمِينَ ﴿٢١﴾

. "And there came
A man, of the city.
He said" O Musa!
The chiefs are taking
Counsel together
About true slay thee:
So get thee away.
For I do give thee
Sincere advice"(S 28 A 20).
"He therefore got
Away there from.

the strength includes physical strength, which is clearer from the story of Jalut[44]. In the case of Talut, Allah (SWT) has described that Talut was

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Looking about
In a state of fear.
He prayed "O my Lord!
Save me from people
Given to wrong doing" (A 21)

[44]Allah in sura 2 describes this as –

أَلَمْ تَرَ إِلَى ٱلْمَلَإِ مِنۢ بَنِىٓ إِسْرَٰٓءِيلَ مِنۢ بَعْدِ مُوسَىٰٓ إِذْ قَالُوا۟ لِنَبِىٍّ لَّهُمُ
ٱبْعَثْ لَنَا مَلِكًا نُّقَٰتِلْ فِى سَبِيلِ ٱللَّهِ ۖ قَالَ هَلْ عَسَيْتُمْ إِن كُتِبَ عَلَيْكُمُ
ٱلْقِتَالُ أَلَّا تُقَٰتِلُوا۟ ۖ قَالُوا۟ وَمَا لَنَآ أَلَّا نُقَٰتِلَ فِى سَبِيلِ ٱللَّهِ وَقَدْ أُخْرِجْنَا مِن
دِيَٰرِنَا وَأَبْنَآئِنَا ۖ فَلَمَّا كُتِبَ عَلَيْهِمُ ٱلْقِتَالُ تَوَلَّوْا۟ إِلَّا قَلِيلًا مِّنْهُمْ ۗ وَٱللَّهُ
عَلِيمٌۢ بِٱلظَّٰلِمِينَ ﴿٢٤٦﴾ وَقَالَ لَهُمْ نَبِيُّهُمْ إِنَّ ٱللَّهَ قَدْ بَعَثَ لَكُمْ طَالُوتَ
مَلِكًا ۚ

وَقَالَ لَهُمْ نَبِيُّهُمْ إِنَّ ٱللَّهَ قَدْ بَعَثَ لَكُمْ طَالُوتَ مَلِكًا ۚ قَالُوٓا۟ أَنَّىٰ يَكُونُ لَهُ
ٱلْمُلْكُ عَلَيْنَا وَنَحْنُ أَحَقُّ بِٱلْمُلْكِ مِنْهُ وَلَمْ يُؤْتَ سَعَةً مِّنَ ٱلْمَالِ ۚ قَالَ إِنَّ ٱللَّهَ
ٱصْطَفَىٰهُ عَلَيْكُمْ وَزَادَهُۥ بَسْطَةً فِى ٱلْعِلْمِ وَٱلْجِسْمِ ۖ وَٱللَّهُ يُؤْتِى مُلْكَهُۥ مَن
يَشَآءُ ۚ وَٱللَّهُ وَٰسِعٌ عَلِيمٌ ﴿٢٤٧﴾

[45] Has thou not turned
The vision to the chiefs
of the children of Israel
After the time of) Moses
They said to a Prophet

appointed as *Ameer* because he was possessing the knowledge, determination and bodily strength. In this case the Almighty Allah has negated that the worldly things are important in the case of *Imarat*. For *Ameer* it is one of the requirement of Holy Quran that he should be soft and kind hearted[45]. In *Hadith* there is no clear cut guidance about the

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(that was among them:
"*Appoint for us*
A king, that we
May fight in the cause of Allah".
He said; " Is it not possible,
If you were commanded
To fight, that ye will not fight?
They said "How could we refuse
To fight in the cause of Allah
Seeing that we were turned
Out of our homes and our families?"
But when they were commanded
To fight, they turned back.
Except a small band amongst them.
But Allah has full knowledge
Of those who do wrong.
Their Prophet said to them;
"Allah hath appointed
Talut as King over you,"
They said: "How can he
Exercise authority over us
When we are better fitted than he
To exercise authority,
And he is not even gifted.
With wealth in abundance?"
He said Allah hath chosen
Him above you,
And hath gived him abundantly
With knowledge and bodily: Prowess:
Allah Granteth His authority
To whom He pleaseth;
Allah is All embrassing
And He Knoweth all things." (Holy Quran)S 2 A 246, 247

Thus the bodily strength is also an added qualification which may also be seen in *sura* 2 verse 247

45

qualification of *Ameer*. The sayings of the Prophet (SAW) that *Ameer* will be from amongst Quresh was only a prediction because his saying that "unless they (Quresh) will do such and such" makes it clear. However Hasan Basari(Rah) says[46] that there are three qualifications for *Ameer*.

I. He must not be follower of his carnal desires.

II. He must not be fearful of the people.

III. He must not be involved in bribery.

He has taken this inference from the verses of the Holy Quran.[47] Caliph Umar bin Abdul Aziz(Rah) says[48] that *Ameer* must be possessing five qualities.

فَبِمَا رَحْمَةٍ مِّنَ ٱللَّهِ لِنتَ لَهُمْ ۖ وَلَوْ كُنتَ فَظًّا غَلِيظَ ٱلْقَلْبِ لَٱنفَضُّوا۟ مِنْ حَوْلِكَ ۖ فَٱعْفُ عَنْهُمْ وَٱسْتَغْفِرْ لَهُمْ وَشَاوِرْهُمْ فِى ٱلْأَمْرِ ۖ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى ٱللَّهِ ۚ إِنَّ ٱللَّهَ يُحِبُّ ٱلْمُتَوَكِّلِينَ ﴿١٥٩﴾

"It is part of the Mercy of Allah
That thou dost deal
Gently with them
Wert thou severe or harsh hearted
They would have broken away
From about thee...."(Holy Quran S 3 A 159)

[46] Mohd. Bin Abdullah Bukhari, 'Sahee Bukhari Sharif' (Arabic) (Delhi: Maktab Rashidia) II p.1061

[47] O Daud ! We did indeed
Make thee a vice gerent
On earth: So judge thou
Between man in
Truth (and justice):
Nor follow thou the lust
(of thy heart), for it will
Mislead thee form the right Path

[48] Supra note- 5

I. He must have capacity to infer the conclusion especially about the matters brought before him.

II. He must not be short tempered.

III. He must be free from allegations.

IV. He must be firm on the basic principles

V. He must contain the scholarly thrust.

In short it may be said that there are two[49] types of qualifications of *Ameer*.

I. Essential

II. Desirable

I. ESSENTIAL QUALIFICATIONS

There are three essential qualifications

(I). He must be Muslim[50]

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[49] S.A.A. Maududi 'Islami Reyasat'(Delhi:Maktaba Jamia, 1991) pp. 34 – 35.

[50] "O ye who believe!
Obey Allah and obey the Messenger
And those charged
with authority among you". 'The Holy Quran S 4 A 59) the expression 'O ye who believe' and 'among you' means it is clear that he must be Muslim.

51.

اَلرِّجَالُ قَوَّٰمُونَ عَلَى اَلنِّسَآءِ بِمَا فَضَّلَ اَللَّهُ بَعْضَهُمْ عَلَىٰ بَعْضٍ

"Men are protector (Qawwam) and maintainers of women"; (Holy Quran S 4 A 34) (Qawwam : One who stand firm in another's ... business protects his interests and looks after his affairs). Since Allah kept some qualities in men to look after the affairs which women do not , the women are having some other qualities which men do not have. So Allah guides the men to consult women in

(II). He must be male[51]

(III). He must be judicious and sagacious [52]

Apart form this, there are certain desirable qualifications,i.e .

(I). He must be just [53]

(II). He must be righteous[54]

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the affairs of house hold . Apart form this Bukhari contains a Hadith that the nation cannot get success who have chosen a women as their head.

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وَلَا تُؤْتُوا۟ ٱلسُّفَهَآءَ أَمْوَٰلَكُمُ ٱلَّتِى جَعَلَ ٱللَّهُ لَكُمْ
قِيَٰمًا وَٱرْزُقُوهُمْ فِيهَا وَٱكْسُوهُمْ وَقُولُوا۟ لَهُمْ قَوْلًا مَّعْرُوفًا

" To those weak of understanding
Give not your property
Which Allah has assigned
To you to manage." (The Houly Quran S 4 A 5). S.A.A Maududi has mentioned the fourth qualification relying upon chapter VIII verse 72 of the Holy Quran that *Ameer* must be resident of Islamic State or neutral/secular State but this inference is in contradiction with *Hadith* of the prophet that wherever there are three Muslim they should chose one of them as *Ameer*. See Islamic Reyasat 1991p 347.

53

۞ إِنَّ ٱللَّهَ يَأْمُرُكُمْ أَن تُؤَدُّوا۟ ٱلْأَمَٰنَٰتِ إِلَىٰٓ أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ ٱلنَّاسِ
أَن تَحْكُمُوا۟ بِٱلْعَدْلِ ۚ إِنَّ ٱللَّهَ نِعِمَّا يَعِظُكُم بِهِۦٓ ۗ إِنَّ ٱللَّهَ كَانَ سَمِيعًۢا بَصِيرًا

"Allah doth command you to send back your Trust to those whom they are due; and when ye judge between the people that ye judge with justice: verily how excellent is the teaching which He gives you !" (' The Holy Quran S 4A 58).

Thus in this verse justice is taught by Allah which is also the means to judge the ability & quality of the *Ameer*

54

(III). Abundance of knowledge and bodily prowess[55]

(IV). He must be remembering Allah[56]

يَٰٓأَيُّهَا ٱلنَّاسُ إِنَّا خَلَقْنَٰكُم مِّن ذَكَرٍ وَأُنثَىٰ وَجَعَلْنَٰكُمْ شُعُوبًا وَقَبَآئِلَ لِتَعَارَفُوٓا۟ ۚ إِنَّ أَكْرَمَكُمْ عِندَ ٱللَّهِ أَتْقَىٰكُمْ ۚ إِنَّ ٱللَّهَ عَلِيمٌ خَبِيرٌ

"The most honoured of you in the sight of Allah is (He who is) the most Righteous of you." (Abdullah Yususf Ali "The Holy Quran S 49 A13) Since Imarat is an honourable post and one who is dishonoured in the sight of Allah cannot be *Ameer*

[55] Their Prophet said to them; "Allah hath appointed Talut as king over you," They said : "How can he Exercise authority over us when we are better fitted than he to exercise authority. And he is not ever gifted. With wealth and abundance?" He said Allah hath chosen him above you, and hath gifted him Abundantly with knowledge and bodily prowess:" (The Holy Quran S 2A 247) Thus the reason of appointment of Talut as head, was the knowledge and the bodily prowess Also see supra note 42 ٤٢ ٤٧

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وَٱصْبِرْ نَفْسَكَ مَعَ ٱلَّذِينَ يَدْعُونَ رَبَّهُم بِٱلْغَدَوٰةِ وَٱلْعَشِىِّ يُرِيدُونَ وَجْهَهُۥ ۖ وَلَا تَعْدُ عَيْنَاكَ عَنْهُمْ تُرِيدُ زِينَةَ ٱلْحَيَوٰةِ ٱلدُّنْيَا ۖ وَلَا تُطِعْ مَنْ أَغْفَلْنَا قَلْبَهُۥ عَن ذِكْرِنَا وَٱتَّبَعَ هَوَىٰهُ وَكَانَ أَمْرُهُۥ فُرُطًا

(V). He must not be follower of his own desires[57]

(VI). He must not be extremist[58]

(VII). He must be soft hearted[59]

(2). COMPARATIVE STUDY:

The constitution of Imarate Sharia Bihar and Orisa was enacted in 1940 to 50 but was only adopted in 1996[60]. Sections 6 to 9 deal with the *Ameer* and his position, while section 10 describes his qualifications[61], which are as under

I. He must be a Muslim[62]

II. He must be practical and religious scholar. i.e. he must have considerable knowledge of the book of Allah (Quran) and Traditions of the Prophet(SAW)(*Hadith*). He must be a jurist of eminence and must have great say in the matters relating to book of Allah and the *Sunnat* of the Mohammad (SAW) and follow the things practically[63]

III. He must be well acquainted with the Indian politics and politics of

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"... nor obey Any whose heart we have permitted to neglect the remembrance of us. One who follows his own Desires, and his affairs become All excess" (Holy Quran S 18 A 28)

[57] Ibid.

[58] Ibid.

[59] The Holy Quran S 2 A 247 also supra notes 42 and 53

[60] It was adopted by the Constituent Committee (Majlise Shura) on 22nd September 1996. It contains 46 sections.

[61] The word 'AWASAF' has been used in the Constitution of Imarate Sharia, which means qualities.

[62] Section 6 of the Constitution of Imarat

[63] Ibid. S 10 (1)

Islamic wold and possibly having practical experience in the said field[64].

IV. He must have sway over majority of the members of Muslim community[65]

V. He must be unhesitant in telling truth, unfearful and firm over the decisions[66]

Thus the essential qualifications[67] of *Ameer* are mentioned in the constitution of Imarat[68]. The desirable qualification[69] of *Ameer* is not fully mentioned in the constitution of Imarate Sharia (Bihar & Orissa). The 2nd qualification is not incorporated in the said constitution. The 3rd qualification of knowledge is incorporated in the constitution of *Imarat* but the bodily prowess is not mentioned there. The fourth, fifth, sixth and seventh[70] desirable qualifications are not mentioned in this constitution. However the *Imarat* has evolved its own desirable qualifications especially[71] sub sections two, three and five. Now the question arises whether the Muslims of Bihar have fulfilled their obligations in this field? If the *Hadith* says that where there are three Muslims they should select one as *Ameer*. There is no any territorial boundation. If it is so why Orissa & Bengal is included in that? If it is inferred upon *Bani Yarbua* or Muslims residing in non-Muslim state the whole India should be incorporated in this institution. Still there is demand of this institution at all India level. The

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[64] Ibid. S 10(2)
[65] Ibid. S 10(3)
[66] Ibid. S. 10(4)
[67] Supra notes 48-50
[68] S 6, (10) of the constitution of Imarat
[69] See supra notes 51-57
[70] See supra notes 54 -57

well-known Scholar of Islam and former head of the Muslim Personal Law Board, late Syed Abul Hasan Ali Nadwi has also written about the need of the institution[72]. If the religious scholars of Bihar, Orissa, Bengal and even Deoband, Barelly and Salfia are not worried about this, certainly the action of *Ulema* regarding the institution of *Imarat* will lead the Muslim masses to think that this institution is not necessary in India. And if it is necessary persons having religious knowledge will be treated defaulters by those having practical experience. A catena of books have been published by Imarate Sharia but none of the books except *Masala Imarat Aur Hindustan* (written in Urdu) is published regarding *Imarat* in India. Although the present *Ameer* Maulana Nizamuddin, when he was vice *Ameer* of Imarate Sharia had written that there was scheme of all India *Imarat*, which was delayed due to illness of Maulana Mehmoodul Hasan[73]. He had not commented as to why that could not be established till now. It may be that in case of *Ameer* at all India level, the local effect of the *ahlul hall wal aqd* will be lesser and the *Ameer* of Bihar will be appointed by Chief *Ameer*. This fear could have made them inactive in the establishment of *Imarat*. If it is so it is against the spirit of Islam. In this way we reach at the conclusion that in Imarate Sharia the qualification is not strictly in accordance with the desirable qualification of *Ameer* and the institution of *Imarat* which is necessary institution for Islamic life is treated as part and partial of Islamic life by Imarate Sharia even then its workers are not so active in establishing an institution of *Imarat* at all India level.

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[71] Section 10 of the Constitution of Imarat. Also see supra notes 82-84
[72] Miftahi pp. 9-32
[73] Datoor Imarate Sharia (or the Constitution of Imarate Sharia) p. 4

CHAPTER - 2

ALTERNATIVE SETTL EMENT MECHANISM

یہ باتیں خالی اپنے خانہ ویرانی کو کیا کم ہیں"
ہوئے تم دوست جسکے دشمن اسکا آسماں کیوں ہو

"Your help is enough to destroy me. Sky need not to bother for my destruction"

افعال عالات سے یہ فتنہ آدمی کے خانہ ویراں کو لیا کم ہے

CH-2: ALTERNATIVE SETTLEMENT MECHANISM

1. INTRODUCTION:

The lexicon Webster Dictionary defines alternative as a choice between two things, so that if one is taken the other must be left; a possibility of one of two things so that if one thing is false the other must be true[1].

The Yale Law Journal defines it as "an alternative" or alternative course of action is one among two or more possibilities, the doing of which will exclude doing any of the others, i.e. one can do one alternative or another, until a choice is made, however, one has alternatives, i.e. has more than one option.

In dispute settlements where a person has the option to go to the court or get the matter resolved by negotiation or any other means it is alternative to the court.

2. HISTORICAL DEVELOPMENT AND ALTERNATIVES:

India is a place where history is witness of several invasions and the settlement of different tribes and clans having the values of their own. From

early known history[2] of India and down to the 20th century;Persians(558 BC), Yavanas (522 BC), Macedonians (327 BC), Hunas, Mohd. Bin Qasim (712 AD), Mehmood Ghaznavi (1000-1027), Shahbuddin Ghori (1192), Timur (1398), Baber (1526), Portuguese, Dutch, Nadir Shah (1739), Britishers (1757), Ahmad Shah Abdali (1761), and others attacked India. A large number of their army-men and nobles settled over this territory with their separate culture. Apart from this, there is a long list of persons who founded their own religions. Manu and others (Hinduism), Mahavir Swamy (Jainism), Gautam Budha (Budhism), Kabir (Kabir Panthi), Akbar (Din-I-Ilahi) and Guru Nanak (Sikhism) which is followed in India. Thus in this way this country has a composite of culture. The rulers tried to harmonise the law in such a way that the subjects may not feel aggrieved. The persons also mixed up with the existing culture but not to the extent of leaving their own. They maintained their identity. Consequently there was alternative remedy. Even today the village folk play an important role in this matter.

In ancient India the *Sabha* or village people assembly of the *vedic* age probably functioned as a popular court. The Arthshastra polity was a highly centralized one but it left a number of cases to be decided by unofficial courts. Disputes about the boundaries were to be settled by the elderly persons[3]. Cases concerning the affairs of temples, Brahmanas, ascetics, women, minor, old and handicappers were also to be decided by *Dharamshashtra* or unofficial jurists. In the later period, this *Sabha*, as Dr. P. Saran Sharma is also of the opinion, was transplanted into *Darbar*. These

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[1] The Lexicon Webster Dictionary 5th ed.
[2] History and Culture of Indian people,(Bombay: Bhartiya Vidya Bhawan, 1990), P-39
[3] (Arthashastra, III/20)

Sabhas were 1st mentioned in *Yajnavalkya Smirti. Yajna valkya* and *Narada Smirtis*, mentioned four types of popular courts, *Kul, Sreni, Puja* and *Gun*[4]. Vijnaneshwar described them as agencies of adjudication of other than the official one[5]. The *Kul* court was informal body of family elders or alternatively it may have been a court, taking cognizance of quarrels arising in family units of ten, twenty or forty villages. When the effort at family arbitration failed, the matter was taken to the *Sreni* court. The term *Sreni* was used to denote the courts of guilds, a prominent feature of the commercial life in ancient India from 500 B.C. *Sreni* had their own executive committee of four or five members and settled the disputes among their members. These guild courts continued to function till 18th century in Maharashtra.

The *Puja* courts consisted of members belonging to different caste and professions but staying in the same village or town. The *Gram Vidhan* court of the *Arthshastra* would also be the forerunner of the *Puja* court. *Puja* court later known as *Gola* court in Maharashtra. In Karnataka, it was known as *Dharmshastra* during the 17th century A. D.

There was no limit to the jurisdiction of the popular court in civil matters. They could not, however, try criminal cases of a serious nature. Minor offences including accidental homicides etc. could, however be disposed off by them. There were hardly any rigid and complex procedural laws dealing with the disputes in these courts. Their decisions and judgements were based on commonsense. The fact that the *panchas* came from the very village had a salutory effect upon the litigations. They gave less importance to legal technicalities and laid much stress upon the amicable settlement of disputes.

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[4] Prabha Bhargav, 'Justice at the door steps' 1998, p. 72.
[5] Ibid.p13

These popular courts or *village panchayats* or *guild* courts were appreciated because they encouraged the principle of self-government, reduced the burden of the central administration and helped the cause of justice.

In medieval period we come across several cases of kings like Shivaji, Rajaram and Shahu refusing to entertain any case at the 1st instance though pressed to do so. Muslim rulers also, like Ibrahim Lodi and Adil Shah of Bijapur used to do the same, even when one of the parties was of Muslim community and complained that there was a prejudice against him on that score[6]. Thus it was considered policy of the Governments that those popular village courts should flourish. The Governments refused to entertain any suit except in appeal against their decisions and it also gave effect to their decrees.

The local courts, as dispute resolution institutions, continued functioning with minor variations, till the advent of Muslim rule in India. During the Muslim rule, the *Royal* courts existed in administrative centres but they did not produce a unified national legal system of the kind that developed in the West. The law made by the Muslim rulers did not penetrate into the villages. Throughout the Muslim rule, there was no direct judicial administrative system at the village level where most of the population lived. The disputes in villages and even in cities were not settled by *Royal* courts but the *Adalats* of the caste within which the disputes arose or the guilds and associations of traders and artisans. These tribunals were empowered to adjudicate in accordance with the custom or usage of the locality, caste trade or family. The law administered by the *Panchayats* or people's court was usually caste and tribal usage and the customary law of the land. However Muslim

[6] Ibid p.14

rulers traditionally enjoyed and occasionally exercised a general power of supervision over popular courts[7].

The procedure followed by the people's courts was quite simple, systematic and primitive. There was no regular administration of justice, no certain means of filing a suit and fixed rule of proceeding after it had been filed. There was no hard and fast rule meant for administering justice for the subjects as a whole. Qazis were concerned more with the matters arising in the cities and towns and adjoining areas. Hindus were generally governed by their customs and the provision of *Shastras*, when a public trial of the accused person was deemed necessary. The *Amil*[8] could order the people's court to be assembled. Many factors were taken into consideration for arriving at the truth after setting every item of the evidence adduced. Civil and Criminal disputes were decided by caste men or village elders and popular courts[9](in the form of caste[10]or guild court) or by religious heads.

It may also be noted that there were many factors to the survival of popular courts. Some Royal courts were not within the easy reach of the people. They had the power to decide local disputes and acted as an effective instrument for administration of justice[11]. The people were also satisfied by the decisions of the popular courts and relieved the government to a very great extent of its judicial functions. The speedy decisions of cases and the absence of long and untreated legal proceedings were admired by the rulers. These people's courts, particularly the village court survived for a long time and

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[7] Law commission of India 14th Report Vol.1. 1958 p.26.
[8] Amil means an official appointed by the government.
[9] 14th Law Commission Report Page 27.
[10] Ibid p. 26.
[11] Ibid.

existed even at the time of the commencement of the British rule in India. The whole edifice of 'Lok Adalat' that had been in vogue since ancient times crumbled under the British foreign yoke. During British rule, commencing from 1861 the judicial administration of the village by the agencies of Central Government; extension of jurisdiction of modern civil and criminal courts with their adversary system of adjudication which was unknown and new to the village population; increase in the means of communication; progress of English education; new land revenue system; police organisation; migration of people from village to towns; growing spirit of individualism and certain other new developments, caused the decay of village *panchayat* system. But, again the alternatives, in independent India, is needed[12] due to the following reasons.

3. CAUSES OF ALTERNATIVE REMEDY

3(1). ADVERSARY SYSTEM REACTIVE MOBILIZATION:

India has adversary system. It is the jurisprudential, says the Black's dictionary of law, 'network of laws, rules and procedures characterized by opposing parties who contend against each other for a result favourable to themselves. In such system, the judge acts as an independent magistrate rather

[12] Bhargav, pp. 12-15.

than prosecutor[13]. This system no doubt is a result of developed human society but it suffers from certain defects. It comes in the soft form for the rescue of the poor beings. Wherever the litigation is between 'haves' and 'have nots', the latter will suffer and the former will have undue advantage. That is why Justice Krishna Iyyer says-

" From this angle, affirmative procedural action, a departure from "adversarism", becomes an obligation where public justice and the whole truth become the major concern of the judge."

The Indian legal system follows the common law model of reactive mobilizaton of the law instead of proactive one[14]. The reactive mobilization is that system where the subjects are to initiate the legal proceeding. But in proactive mobilization, the state is to start the legal proceeding of its own. The action which affects the established norms that may be either person or property in broader sense must be coupled with the state's proactive mobilization. The masses who are financially weak and unaware of the law, will be at loss for non availability of proper legal aid. The idea of leisses fair has gone and the idea of welfare state has emerged. Fortunately the Indian constitution makes provision for a socialistic pattern of society[15].

So the I aws that attack certain segments of the social structure have to be amended or abolished. It will be quite appropriate if it is said that radical agenda for change in the judicial system must be drawn up by a judicial

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[13] Black's, Dictionary of Law, 5th edition.

[14] Helen B. Kim Says " Our courts are based on an adversarial system that relies upon knowledgeable parties on both sides of the controversy to form, develop and present all relevant facts and legal arguments to the courts. The parties are not only assured the opportunity, but also bear the burden of doing so. Consequently our adversarial system may work unfairly... " (The Yale law Journal, vol.96 : 1641, 1987, p.1644).

[15] Preamble to the Constitution of India (amended up to date)

planning commission and a five year plan formulated with creative imagination geared to better performance, independence, modern management, introduction of high technology and fundamental reform in the adversary process and control over judicial process[16]. However the Quza system which is followed by Imarate Sharia does not follow the above systems. The Qazi is not depended upon the litigants like judges of Indian Judiciary.

3(2). TIME TAKING PROCESS:

It is said that justice delayed is justice denied. The Indian legal system is a bundle of delaying tactics. It would not be out of place if Cappeletti is quoted-

"Our judicial system has been aptly described as follows :

"Admirable though it may be, (it) is at once slow and costly. It is a finished product of great beauty but entails an immense sacrifice of time, money and talent[17]".

The Indian legal system is considered as delaying system which is a fact. The delay is the result of several lackness of the legislative, executive, court itself and the bar. The legislature has failed to provide the limitation of time in litigation. The national and gazetted holidays also serve as hindrance in deciding the matters in time. There are holidays, which are in addition to the summer vacation of 45 days and winter vacation of 8 days.

3(2)i. THE EXECUTIVE CAUSED DELAYS:

The executive also plays a vital role in the delaying process in the Indian legal system. The appointment of the judges are made by the executive.

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[16] Justice V.R Krishna Iyer 'Justice at Cross Roads',P 118.
[17] Ibid 145.

As per Shah Committee report from 1965 to 70 there were 799 days' delay in the appointment of the judges. The corresponding figure is-

for Bombay High Court- 454 1/2 days;

for Patna High Court- 694 days

for Delhi High Court- 450 days

for Punjab and Haryana High Court- 459 days

for Calcutta High Court- 390 1/2 days.

Whatever may be the cause of delay but the work suffers. Some commentators have said that it is due to misunderstanding between the executive and the chief justice, upon whose recommendation the appointment is made[18].

The 58th report of law commission says that all the persons having interest in this administration of justice are well aware with the burden of arrears. It says that the increasing number of judges is not enough but quality is needed as there in manipulation in the appointment[19].

3(2)ii. MISMANAGEMENT OF COURT WORK :

The mismanagement of the court is one of the main causes of delay in deciding the cases and causing arrears. The Shah Committee points out that the courts to accumulate failed to give-

(i) proper notification to the cases which are ready ;

(ii) provide priority for old cases as 1st come 1st serve basis, and

(iii) file together cases containing substantially similar points of law contributing to delay and arrears in the High Courts. The committee

[18] Ibid.

[19] Law Commission of India 58th Report 1974 p. 177-118.

reports-

"We have been told that in the office of the High Courts manipulations, where cases could be held up from being disposed off are being made with the result that older cases which could be disposed off are held up and add to the backlog[20]".

Judicial work load is increasing day by day. The appeal review and revisional jurisdiction increases the work load on Courts to a great extent. Another factor of work load and delay is the frequent use of the writs given under Articles 226. The 14th Law Commission Report has pointed out that the High Court have granted the interim relief too frequent. The Shah Committee report also comments over this problem and says that there is no clear guideline of the use of writ jurisdiction. The bench structure is also an important factor in delaying process.

Too much fluctuation in the bench structure disables the Court from availing specialist interest of individual justices in certain fields of law which might, if heeded facilitate expeditious handling of cases. Obviously, special aptitudes of judges should be borne in mind while forming the benches[21].

As per Shah Committee report the courts rosters are so arrange that a bench of judges breaks up three times in the course of a day. This is responsible for cases remaining half heard and that is to be taken as and when the bench is available, and if a fairly long period elapses as it does many times, the case has to be argued again from its inception[22].

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[20] Shah Committee : Reports of the High Courts Arrears Committee, (1972), p. 47.
[21] Prof. Upendra Baxi, The Crisis of the Indian Legal System, 1982, p. 72.
[22] Shah Committee on High Courts Arrears, P. 83 (commenting upon this P. Chandrashekhar Rao in " the Arbitration and Conciliation Act 1996; A Commentary" p.53 Says the first part of arbitration Act 1996 restricts the courts to intervene in arbitral process.' This is to be particularly

The Law Commission in its 14th report says that cases are not disposed in time. Several adjournments are made. The witnesses as well as the parties face the problem, as they have to attend the case unheard[23].

3(2)iii. DELAY DUE TO BAR :

There is a concept that lawyer is a court officer who helps the court in the administration of justice. This concept now a days, seems obscure. The lawyers ordinarily engage themselves in more than one cases to be heard at the same time. Consequently the cases are passed unheard. Engagement in many cases make the lawyers to come without preparation it is now common phenomenon to read the case for the first time in the court in the way of argumentation. The court's control over the lawyers is almost nil. The lawyers make lengthy arguments. The judgements are read verbatim from inception to final order[24].

The reorientation of the court management by chief justice is defied instead of cooperation from the bar. When the chief justice Satish Chandra of the Allahabad High Court initiated certain steps to manage more expeditions administration of justice, the Bar Association described those as measures to "massacre justice" and proceeded on strike lasting for about thirteen days in May 1980. The chief justice initiated several reforms, which threatened major aspects of the livelihood of lawyers. The rotation of benches was so determined that the pick their own bench at will was abolished. To combat the menace of stay orders, which took three to eight years for ultimate disposal,

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welcomed having regard to the prevailing tendency of taking frequent recourse to courts as a delaying tactice.'

[23] 14th Law Commission Report, Volume I p.19.

[24] Baxi : p.54.

the chief justice and his colleagues together bunched a large number of matters and began disposing them all through one decision involving similar or same legal contentions in numerous matters. Specialist benches were constituted; these also led expedition in disposal. This had the result that litigation designed to secure a stay order, protecting the interests of clients for fairly long periods of time, became less attractive. Criminal revision application which used to take three years began to be disposed of about three months, this result was achieved by the simple device of not allowing, save for exceptional reasons, lawyers to call for records from district courts which invariably took (and was often made to make) long time. The system of "Friday" adjournments inveterate in the Allahabad Bar was virtually rendered extinct by external anti-adjournment drives by the chief justice. Friday adjournments were freely available on production of illness slips the elongated weekend was used to solicit and attend to clients in the interior ... halls of the Uttar Pradesh[25].

The lawyers strike, extending even to the 1st two days of the vacation, could best be understood as their resistance to uprooting the traditions of Allahabad Bar by boldly assertive chief justice, unmindful of public relations with the 'leaders' of the Bar. But the unprincipled and even malicious propaganda accompanying the lawyer's protests, involving attacks (covert and overt) on the dignity and personality of the chief justice and brother justices must indeed have caused some demoralization among the bench. Interestingly apart from the media support (in the columns of The Hindustan Times) the confrontation received no attention from the All India Bar or even the judiciary and others who otherwise reiterate the virtues of

[25] Ibid.

streamlining judicial administration, avoiding arrests and of the survival of the people's confidence in the judicial system.

The civil justice committee (The Ramkin Committee) noted that there is a tendency in India to over prove essential allegations and there is further tendency to prove and over prove unessential allegations. Even more surprising is the cross examination which frequently extends over a period which is more than six times as long as is necessary to produce useful results.

The hearing of the cases are adjourned contrary to the rule of C.P.C.[26] under Order xvii rule (2) (a) which says about day to day hearing. Even the amendment of 1976 against the adjournments has little effects upon the practice. The engagement of the lawyers and their illness is not to be considered as a ground of adjournment. But all such type of load reducing rules are yet to come in the practice.

3(3). REVENUE COLLECTING AGENCY:

It is amazing that our welfare state provides the hospitals for free treatment to the persons who are physically afflicted, enacted the laws to provide the non polluted environment, started streams, canals for irrigation, provided lacs of wells, tube-wells, hand pumps, water-tanks, for proper arrangement of water. But where the persons for whom the above facilities are provided are aggrieved in the matter of their fundamental or other legal rights, are barred to make approach to the courts except on the payment of a heavy fee. The states of U.P & Bihar earned amount from courts fee from 1952-1955, reducing the expenses of the Courts[27]-

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[26] Civil Procedure Code 1898.

[27] For Detail Please see 14th Law Commission Report, p.487-510.

U.P Rs-24604204 (within 3 years) &

Bihar Rs 6789539 (2years)

Our legal system is developed by the colonial lords for their subjects. They didn't bother even taxing for providing the help to the wronged. After independence the system has retained the colonial system of imposition of court fee.

The 14th Report of the Law Commission shows that the amount taken by the litigants is not only enough to meet out the court's expenses but it is appropriated in the general revenue of the State. The imposition of the fee was condemned by Lord McCauley. He termed the preamble to the Bengal Regulation which imposed the court fees as " the most eminently absurd preamble that was ever drawn he says, that the imposition of court fee neither makes the pleadings clearer nor the law plainer, nor the corrupt judge purer, nor the stupid judge wiser. It will, no doubt, drive away dishonest plaintiffs who cannot pay the fee. But it will also drive away the honest plaintiffs who are in the same situation[28].

The fourteenth report of the Law Commission also appreciates the Macauley's observation. The fifty-fourth report of the Law Commission also showed its concern regarding court fee. The Krishna Iyer Committee[29] also observes:

"Some thing must be done, we venture to state to arrest the escalating vice of burdensome scales of court fee. That the state should not sell justice is an obvious proposition but the high rate of court fee now levied leaves no valid alibi is also obvious." The 14th report of Law Commission, the

[28] Ibid, also Baxi p. 54.
[29] Krishna Iyer Committee on legal Aid.

practice of 2% in the Socialists Countries, and the small standard taking fee prevalent in many western countries make the Indian position indispensable and perilously near unconstitutional. If legal system is not to be undemocratically expensive, there is a strong case for reducing court fees and instituting suitors fund to meet the cost directed to be paid by a party because he is the loser but in the circumstances can not bear the burden[30]".

Krishna Iyer also writes in his book that perestroika of judicial reform, the provision for suitors fund, reduction and elimination of court fees and simplifying the rules regarding the preliminary stages in a litigation to facilitate easy take off, is necessary.

3(4). OLD AND OUTDATED LEGAL SYSTEM:

Justice Hegde[31], in the off quoted aphoristic statement admonished that law is one generation behind public opinion and judges were two generations behind[32].

The court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience be found to serve another generation badly and which discards the old rule when it finds that another rule of law represents what should be according to the

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[30] Baxi p. 55

[31] Jennyson Ayuner's Field Says,"Mastering the Lawless Science of our Law,
That code less myriad of precedent,
That wilderness of single instances
Through which a few, by will or fortune led,
May beat a path way out of wealth and fame. " (learning the Law p. 67)

[32] Iyer p.117

established and settled judgement of society[33]. But here the judges have got no new rule to replace the old one.

Law is what law does, so too justice. That is why even in America Roscoe Pound and later chief justice Burger wrote that "in the final third of the century, we are still trying to operate courts with fundamentally the same method, the same procedures and the same machinery (which) were not good enough in 1906. In the super market age, we are trying to operate the courts with cracker barrel corner grocer methods and equipment's vintage 1900[34]". The law commission in its 14th Report says that our present system of judicial administration is not in accordance with the genius of our country[35].

3(5). JUDICIARY IS NOT FREE :

In principle, the independence of judiciary is verbally accepted as valid but its violation is pathologically pervasive[36]. The Judiciary is not free in India. The power of dismissal, punitive transfer works a command over the judges. The thinking of post retired happening makes the judges partial. The financial dependence of the lower courts makes them bound before the executive. Krishna Iyer says , "Survival after tenurial death is a speel of the elderly brothren. Survival after tenurial death is a speel of the executive with its vast reservoir of patronage, uses to purpose and the robed brotheren. Save the robust, succumb." Moreover, the judiciary as an institution, itself subjected to attack or is hijacked criticized, misrepresented, debunked, budgetarily

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[33] Ibid p. 148.
[34] Ibid p. 121.
[35] 14th Law Commission Report p. 31.
[36] Iyer p. 60

humbled and in many innovative ways made to feel that it is in their interests to toe the line. Constitutional guarantees are muscled or menaced by parliamentary plurality and executive authority. Having neither the purse nor the sword, the judiciary yields unless the national bar and the mobilized expression of popular opinion within and without the country come to its aid unless the non-governmental organisations rouse international conscience against high handed aggression on the independence of the judiciary, and the legal fraternity battles for judge power, the war for free justice and liberty would be lost. It is not wise to advocate that judges are above the law. But a sort of new autonomy coupled with social accountability is the need of hour so that the executive and legislative pressure may not be there[37].

3(6). DEMAND OF CHANGE IN THE EXISTING SYSTEM :

There is demand of change in the legal system of India. In the words of Krishna Iyer, " the crisis in the judiciary cannot be tied over unless the country reassesses the whole process of justice, justices and justicing with democratic openness and constructive audit for change prestroika and glasnost are the panacea[38]." Of course, this is a theme which needs elaboration on its own terms and not just a passing reference in the context of the work load of the judicial institutions. But it is hoped that even such a passing reference would illustrate that the crisis in the Indian legal system can not be handled just by tankering with outer peripheries of the justice system. The problem raised by arrears are problems whose scope transcends the court system also presents substantial opportunities for its reconstruction[39].

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[37] Ibid. p. 61
[38] Ibid., p.136
[39] Baxi, p.83

There should be change in the Indian legal system, *panchayati* justice, parameters and problems, grass-roots justice without hierarchical emasculation by higher courts. There is need of non-judicial alternatives and popular participation[40].

One clear basis of differentiation is the presence of state power and authority (which is not omnipresent, witness for example the vissitudes of the "State action" doctrine in American constitutional law). This gives us two main types of legal system in any society. Those organized under the auspices of the state and those organized under the auspices of social groups other than the state. The state legal system, itself is a large bundle of hundreds of state legal system, simplified and abstracted provides a kind of reference group for the conceptualization of non-state legal system (NSLS). The NSLS in the society would have higher demographic presence than the SLS. It is possible at least to say that NSLS display the substantial variations in origins, development, structure, process, efficiency and viability[41].

Thus it is for vital importance of the proper functioning of the courts to the country. In the social welfare, land and tribunals, which administer them, will have a constantly growing role to play. So a serious endeavour is must to ensure the discharge of those functions efficiently, without harassing the witnesses. The parties should be provided cheap and speedy justice the least expenditure of their time.

For this purpose a N.G.O namely Imarate Sharia has started a non state legal system which is delivering justice with very less cost and time[42]. It

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[40] Iyer, p. 125
[41] Baxi, p.331
[42] See chapter-7 infra for detail study

say that it's system is based on Islamic principle of justice, where justice is not sold.

4. CONSTITUTIONAL MANDATE FOR ALTERNATIVES :

The Constitution of India talks about legal aid Art. 39A says,"The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice, are not denied to any citizen by reason of economic or other disabilities[43]".

Article 40 of the Indian constitution also talks about self-governance of the village *panchayat* so as to make that a unit of self governance. It may be considered as hint to provide alternatives of the self governing unit itself. But that doesn't cover the entire need except the litigations between fellow villagers. The legal aids committees, founded in different states[44] and various rules guiding for the same[45], but it was felt that legal aid alone cannot provide justice. Prabha Bhargav says -

'It is (the Lok Adalat) born out of a belief that even if state supported programme of legal aid were able to provide legal assistance to every indigent client (which of course, is wishful thinking) that is not going to solve the problems of the poor, who do not have the staying power which litigation

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[43] The Constution of India, inserted by 44th Amendment Act.

[44] Bombay Committee in 1949, Bengal Committee in 1950, Gujrat Committee in P.N.Bhagawati's Chairmanship, Tamil Nadu Committee by P.Rama Krishnan, Central Govt. Committee 1972, M.P.Committee 1973 (B.N.Tripathi. Jurisprudence(Allahabad:All. LawAgency 1990)17th ed. . p. 358 to 385.

inevitably involves nor can they expect equal justice in all stages of the complicated and technical procedures of the law. So the legal services Authorities Act, 1987 in its last two chapters has provided for the Lok Adalat and its details. The statement of objects and reasons of the Act has been described as under.

1. 'Article 39A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and shall in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

2. With the object of providing free legal aid, Government had by a Resolution dated the 26th September 1980 appointed the 'Committee for Implementing legal Aid Scheme' (CILAS) under the chairmanship of Mr. Justice P.N. Bhagawati (as he then was) to monitor and implement legal aid programmes on a uniform basis in all the States and Union territories. CILAS evolved a model scheme for legal Aid programme applicable throughout the country by which several legal Aid & Advice Boards have been set up in the States and Union territories : CILAS is founded wholly by grants from the Central Government. The Government is accordingly concerned with the programme of legal aid as it is the implementation of a constitutional mandate. But on a review of the working of the CILAS, certain deficiencies have come to the fore. It is therefore felt that it will be desirable to constitute statutory

[45]The Constution of India Art. 14.15,19,22,29,30,31A,32B.31C.41.43.46 and part XVI and union list entries 77 and 78, concurrent list entry 2,13,20,23,24,26 and state list entry 3, Cr. Sec.204 (C.P.C. order XXXIV, XLIV).

legal service authorities at the National, State and District levels so as to provide for the effective monitoring of legalized programmes. The Act provides for the composition of such authorities and for their funding by means of grant from the Central Government and the State Governments. Power has also been given to the National Committee and the State Committees to supervise the effective implementation of legal aid schemes.

3. For some time now Lok Adalats are being constituted at various places in the country for the disposal, in a summary way and through the process of arbitration and settlement between the parties, of a large number of cases expeditiously and with lessor costs. The institution of Lok Adalats is at present functioning as a voluntary and conciliatory agency with a statutory backing for its decisions. It has proved to be very popular in providing for a speedier system of administration of justice. In view of its growing popularity, there had been a demand for providing a statutory backing to this institution and the award given by Lok Adalats. It was felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but would also take justice to the doorsteps of the poor and the needy and make justice quicker and less expensive[46].

The Act got the constitutional mandate. The Gazette of India has reffered this Act as the fulfillment of the direction contained in Art. 39A[47].

The Apex Court has also observed in *Associated Cement Coy Ltd. V.P.N.Sharma*[48] that under our constitution, the judicial functions and powers of the state are primarily conferred in the ordinary courts. All disputes between

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[46] The AIR Mannual, 5th Ed., Vol. 32, p.268.
[47] Ibid p. 208, Gaz. Of India 24.8.87, pt. II, S. 2, Ext. 28, No. 39.
[48] AIR - 1965 S.C.1595.

citizens, and citizens and state are normally entrusted for adjudication to the hierarchy of courts recognized by the constitution. The state as a sovereign authority delegates its judicial functions and powers mainly to the courts established by the constitution but that does not affect the competence of the state, by appropriate measures, to transfer a part of its judicial powers and functions to Tribunals for adjudication upon special matters and disputes. Again the Supreme Court has held[49] that the constitution of service tribunals may save the courts from the avalanche of writ petitions and appeals in service matters. These tribunals might be able to produce solutions who are not tied down to strict rules of evidence.

Thus the continuance of the alternative system and laws passed by the Parliament is the open evidence of the constitutional validity of the alternative remedies. Moreover the High Courts and the Apex Court in a catena of cases have recognised the validity of the alternative remedies. Last but not least, the insertion of Arts. 323a and 323b of newly inserted part XV A to the Constitution validates the alternatives.

5. PRACTICAL VIEW OF ALTERNATIVE :

Practically the alternative system is functioning in its full swing. The Arbitration and Conciliation Act 1996, Consumer Protection Act 1996 Customs and Excise Revenue Appellate Tribunal Act 1986, Family Courts Act 1984, Foreign Award Act 1981, Illegal migrant (Determination of Tribunals) Act 1983, Judicial Commissioners Courts Act 1950, National Environmental Tribunal Act. 1995. Passed by the Indian Parliament, is an open example of such system. Apart from this, the court itself has rejected the entertainment of

[49] AIR 1980 S.C 2056.

the petitions which have been filed directly, by-passing the A.M.U. Act's[50] alternatives, to the Allahabad High Court[51].

6. ARBITRATION AND CONCILIATION AS AN ALTERNATIVE :

The arbitration, as an alternative remedy for settlement of disputes is accepted all over the world. Arbitration, is 'a process for the decision of a conflict by persons other than government judicial officers[52]. As per Black law dictionary[53]," An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice and is intended to avoid the formalities the delay, the expense and vexation of ordinary litigation[54]". The Arbitration and Conciliation Act is passed in the year 1996. The preamble of the said act reads as under " AND WHEREAS" the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;)

"AND WHEREAS it is expedient to make law respecting arbitration and conciliation taking into account the aforesaid Model Law and Rules".

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[50] Act XL of 1920.

[51] Iftekhar Ahmad V. A.M.U. *Jamal Ahmad Siddiqui* V. *A.M.U.* (20282 of 1999), *Zakir* V. *A.M.U.* (3118 of 1992), *Hashim Ali Khan* V. *A.M.U.* (41481 of 1999). *Dr. Mohd. Zulkefle* V. *A.M.U.* (44601 of 1999), *S. Nazeer Mehdi* V. *A.M.U.* (41482 of 1999), *Dr. Answer Alam* V. *A.M.U.* (37654 of 1999) and *Ms Raihan Raza* V. *A.M.U.* (38841 of 1997) Allahabad High Court.

[52] The Yale Law Journal (Dictionary Edition) Vol. 1855, 1985 p. 2051-52.

[53] Black's Dictionary Referring the Wauragam Mills incorporated textile workers union of America.

[54] Black Dictionary as.

Thus the object of the Act is clear from its preamble that it is enacted for the fair and efficient settlement of dispute, and also for 'respecting arbitration'. The Arbitration and Conciliation Act of India says-

"Not with standing anything contained in any other law for the time being in-force in matters governed by this part, no judicial authority shall intervene except where so provided in this Part[55]".

7. INTERNATIONAL VIEW ON ALTERNATIVES SETTLEMENT OF DISPUTES:

Under the French law, arbitration clauses must be in writing. But the arbitrator need not be actually appointed by the arbitration clause. The clause must either appoint an arbitrator or provide for the manner. By Article 1458 of the French Civil Procedure Code under which when ever a dispute is submitted to an Arbitral Tribunal under an arbitration agreement, the civil court must decline jurisdiction, unless the arbitration agreement is found to be void. Parties can resort to arbitration even if a suit is pending. The time limit of award is fix months but the parties may agree to extend it under Article 1456 of Civil Procedure. Here in India also the cases may be referred to alternative remedies i.e. Lok Adalats even those are pending in the Civil Courts. The legal Services Authorities Act 1985 contains this provision. In U.K. the arbitration act 1979 permits the judicial intervention in arbitral process but that is in stringent conditions and judicial review cannot be sought as a matter of right.

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[55] Act NO 26 of 1996. S.5. However the H.C under Article 226 of the constitution of India and the Supreme Court under Article 32 can intervene in the Arbitral process. The above section is in accordance with the UNCITRAL Model Law on Internation Commercial Arbitration which says -

" In matters governed by this law, no court shall intervene except where so provided in this law".

In U.S the Supreme Court has held in *Mitsubishi Motors Corporation V. Soler Chryster-Plymouth Inc.*[56] that an issue of United States Antitrust Law could be validly submitted to arbitration. Although the Anti-trust Law deals with the things which includes cancellation of distributorship, change in distribution system, including breach of contract, molesting customers of competitor, use of lease etc[57].

Thus the Law [58], which is adopted by Republic of India due to its advantages and has been given the immunity from the intervention of the court, is very popular. In this regard various successful attempts have been made to devise the international procedure for arbitration. The most important of them are :

UNCITRAL,

The Indian Council of Arbitration,

The ICC Court of Arbitration,

The London Court of International Arbitration,

American arbitration,

The International Center for Settlement of Investment Disputes,

Arbitration in the socialist countries.

The United Nations Commissions on International Trade Law (UNCITRAL) is associated with United Nations Organisation. It does not provide arbitration facilities but has sponsored several measures which have made a notable contribution to the unification of the law of international arbitration.

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[56] 473 U.S 614. Quoted by C.M.Schimtth off, p.673.
[57] S.M. Onyar 'MRTP Law & Pratice (Nagpur : Wadhawa And Co., 91) 2nd ed. p. 262-264.
[58] Arbitration & Conciliation Act 1996.

7(1). UNCITRAL ARBITRATION:

United Nations Commission on International Trade Law (UNCITRAL) is associated with United Nations Organisations. It does not provide arbitration facilities but has sponsored several measures which have made a notable contribution to the unification of the law of international arbitration.

The UNCITRAL Arbitration Rules were adopted by UNCITRAL in 1976 and their use was recommended by the General Assembly of the United Nations on December 15, 1976. They have become very popular. They are almost indispensable in ad hoc arbitration's and many arbitral institutions, which have adopted their own rules, allow the parties to use the UNCITRAL Rules in preference or refer to them in order to fill any gaps in their own rules.

'The UNCITRAL Arbitration Rules do not have the force of law in any country[59]. They may be adopted by the contracting parties. The following model clause is recommended for their adoption :

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or loss thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

The main characteristic of the UNCITRAL Arbitration Rules is that no arbitration shall fail on the ground that the parties did not agree on an arbitrator or for any other reason, the UNCITRAL rules contains a lot of loopholes. The right to challenge the opposite party about the arbitrator & the loopholes. The right to challenge the opposite party about the arbitrator & the

[59] Schmithaff 'International Trade' p.674.

provision to change the arbitrator may cause delay. The arbitrators may also be fearful due to this. So it needs change. It does not provide the time limit also for the Arbitration Award.

In India the history of arbitration is very old[60]. Several enactments have been made in this regard[61]. But the new Act has been passed in 1996[62]. Which is based upon the UN.CITRAL Model Law of Arbitration. There were several Chambers of Commerce e.g. Bengal Chamber of Commerce, Bengal National Chamber of Commerce, Bombay Chamber of Commerce & Madras Chamber of Commerce. Which were having their own rules. But the new rules have come into force as the Indian Council of Arbitration has after amendment, adopted the Rules of Arbitration on 1st March 1988. The Council recommends to all parties desirous of making reference to arbitration by the Indian Council of Arbitration, the use of the following arbitration clause in writing in their contracts.

Any dispute relating to the consideration, meaning scope, operation or effect of this contract or the validity or the breach thereof shall be settled by Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

The Rule consists of 80 rules. There is no choice of cities to the parties. The Arbitrators are also to be chosen from the list prepared by council. The council may allow the venue of arbitration in a foreign country if the parties or at least one of the contracting parties is a foreign national. But Indian

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[60] For detail See Supra pages. 40-45

[61] The Indian Arbitration Act 1899, The Indian Arbitration Act 1940 also see Dayal's Arbitration p.1

residents are not allowed to avail this facility. Their case will be decided in the Indian cities. The Council has authority to change the Roll and list of Arbitrators (either by adding or by repealing) at any time. There should not be any restriction as the UN CITRAL model does not restrict the place. So the parties may be allowed to choose any place of their choice. However taking into consideration the financial position of Indians it is reasonable. But the provision may be added that where both the parties are agreed to have a foreign country as venue, they are free (of place of Arbitration.)

7(2). THE ICC COURT OF ARBITRATION:

The ICC Court of Arbitration is the most important institution for the arbitral settlement of international trade disputes[63]. It is widely used and enjoys the confidence and respect of businessman all over the world and is also frequently resorted to in East-West trade.

The ICC Court of Arbitration is not a governmental institution but is created by the International Chamber of Commerce. It has its seat at the headquarters of the ICC in Paris. The present Rules of the ICC Court of Arbitration have been in force since June 1, 1975, they were amended with effect from January 1, 1988[64].

In principle the court meets once a month and draws up its own internal regulations[65].

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[62] The Arbitration and Conciliation Act 1996.
[63] In Bank Mellat V. GAA Development and Construction Co. (1988) 2 Lioyd's Rep. 44, 48.
[64] The 1975 Rules were contained in ICC Brochure No. 291 which was superseded by Brochure 447. This Brochure contains the Rules in force as from January 1, 1989. Also see P.C Rao 'Arbitration & Conciliation p 427-437.
[65] Article-1.

If the parties fail due to dead lock or by any reason to appoint their arbitrator within thirty days, the court will appoint its own arbitrator[66]. The defendant is to reply within 30 days of receipt of documents. In exceptional cases the defendant can request for extension of time. Where there is no agreement to refer the cases to ICC & within 30 days the defendant does not reply, the court shall inform to the claimant that the proceeding cannot proceed. But where there is mention in agreement clause about ICC the court will decide the matter according to its rules and that is binding upon the parties. Where the rules of ICC are silent the agreement clause's rule will be applied otherwise the municipal rules will apply where the arbitration is being made. The arbitrators are to give the award within 6 months. However the Court will verify the award before its publication. The Court is entitled to make modifications in the award[67].

The rule of ICC looks better than UNCITRAL Rules and Indian Council of Arbitration. Unlike ICA it does not bind the parties to choose the Indian cities or any particular country on its own discretion. It is also better than LCIA rules and American Arbitration as they have no such wider acceptance as ICC.

7(3). THE LONDON COURT OF INTERNATIONAL ARBITRATION:

The London Court of International Arbitration is a tripartite organization, sponsored by the London Chamber of Commerce, the London City Corporation, and the Chartered Institute of Arbitrators, and is administered by the latter. Its seat is at the International Arbitration Centre in

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[66] Article-2.
[67] Article-21.

London. The Rules of the London Court of International Arbitration are known as the LCIA Rules.

The court recommends the adoption of the following arbitration clause:

Any dispute arising out of or in connection with the contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.

The Court has prepared several panels of arbitrators which contain the names of many prominent international personalities. A scale of arbitration fees is provided which are within moderate limits.

A number of trade associations provide their own machinery for international commercial arbitration. Their standard contracts normally embody an arbitration clause providing for arbitration under the rules of the association in question. This arbitration is not so popularly accepted as UNICTRAL and ICC. Since most of the countries have their own Arbitration rules, the regional arbitration courts become less important at international level.

7(4). AMERICAN ARBITRATION:

In the United States, 'most commercial arbitration's are governed by the United States Arbitration Act, which applies to all transactions in interstate or foreign commerce or Admiralty and which acquire local laws on the subject[68]. The Act referred to is the United States Arbitration Act, 1925, as

[68] J.Gill Wetter, The International Arbitral Process : Public and Private, Vol.II 1979, 6.

amended[69]. In addition there exists the Uniform Arbitration Act[70] which, sometimes with variations, on May 1, 1984 was adopted by 46 American jurisdictions.

The major United States arbitration institution is the American Arbitration (AAA) which has its seat in New York[71]. It has published various sets of arbitration rules. In international trade transaction the Commercial Arbitration Rules[72], supplemented by the supplementary procedure for International Commercial Arbitration, are relevant. The AAA recommends the inclusion of the following arbitration clause into the parties agreement :

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by Arbitration Rules of the American Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The commercial Arbitration Rules provide that the AAA shall establish a national panel of arbitrators[73]. The Rules further adopt the so-called list procedure if the parties have not appointed an arbitrator and have not agreed on another method of appointment; under this procedure the AAA submits simultaneously to each party an identical list of persons chosen from the panel and the parties may cross off names to which they object or indicate the order of preference ; the AAA then invites the person approved on both

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[69] Title 9, US Code paras. 1-14, enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669).
[70] Adopted by the National Conference of the commissioners on Uniform State Laws in 1955 and amended in 1956.
[71] Address : 140 West 51st Street, New York, N.Y. 100 120.
[72] As amended and in effect from April 1, 1985.
[73] AAA Commercial Arbitration Rules, Art. 5.

lists according to the order of preference to act as arbitrator[74]. Each arbitrator is required before the first hearing to take an oath of office[75].

The AAA has also published separate rules and procedure for cases under the UNCITRAL Arbitration Rules, if the parties prefer arbitration under these Rules.

7(5). THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES:

An attempt has been made to the protection of foreign investors from the procedural angle by providing machinery for the settlement of international investment disputes. This approach has been successful. In 1965 a convention on the settlement of Investment Disputes between States and Nationals of others states was concluded in Washington[76]. This convention has become effective, on June 30, 1988, it had been ratified by 89 countries, including the United States, the United Kingdom, France and West Germany. The United Kingdom gave effect to it by the International Investment Disputes act as amended[77].

The convention, which was sponsored by the International Bank for Reconstruction and Development, provides for the formation of an International Centre for Settlement of Investment Disputes (ICSID) at the principal office of the Bank in Washington[78]. The ICSID makes available facilities to which contracting states and foreign investors who are nationals of other contracting states have access on a voluntary basis for the settlement of

[74] Ibid Art, 13
[75] Ibid Art, 27
[76] The convention entered into force on October 14, 1966.
[77] The convention entered into force for the U.K. on January 18, 1967.

investment disputes between them in accordance with rules laid down in the Convention. The method of settlement might be conciliation followed by arbitration in case the conciliation effort fails. The initiative for such proceedings might come from a state as well as from an investor. The ICSID itself does not act as conciliator or arbitrator but maintains panels of specially qualified persons from which conciliators or arbitrators can be selected by the parties, and provides the necessary facilities for the conduct of the proceedings. Once a state and a foreign investor have agreed to use the facilities of the ICSID, they are required to carry out their agreement, to give due consideration to the recommendations of a conciliator and to comply with an arbitral award. In addition, all contracting States, whether parties to the dispute or not, are required to recognize arbitral awards rendered in accordance with the convention as binding and to enforce the pecuniary obligations imposed thereby.

The convention establishing the Multilateral Investment Guarantee Agency (MIGA) to which the United Kingdom has given effect by the Multilateral Investment Guarantee Agency Act 1988, provides an arbitration procedure for certain disputes; it further provides that, if the arbitration tribunal is not constituted within 60 days, the arbitrator or the president of the arbitration tribunal shall be appointed, at the joint request of the parties, by the Secretary General of ICSID.[79]

The ICSID has published four sets of Rules, viz. the Administrative and Financial Regulations, the Institution Rules, the Arbitration Rules and the

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[78] The address of the ICSID is : 1818 H Street, N.W.Washington, D.C. 204, U.S.A.

[79] Convention, Annex II, Art. 4(b). The Convention is reproduced as schedule to the Multilateral Investmetnt Guarantee Agency Act 1988.

Conciliation Rules. They, together with the convention, are published in a document entitled "ICSID Basic Documents".[80]

The adoption of UN.CITRAL model rules has lessen the importance of Arbitration Courts. Now nearly each country has Arbitration Court and Rules. So the parties bargain and come at conclusion to refer their matter to the nearest Arbitration Court. For Arabian & African Countries this is not so important.

7(6). EUROPEAN ARBITRATION:

A European Convention on International Commercial Arbitration was signed on April 21, 1961 in Geneva and came into force on January 7, 1964[81]. The Convention was sponsored by the UN Economic Commission for Europe. The Convention as sponsored, has been ratified or adhered to by various countries [82].

Other provisions of the convention, which should be mentioned are that foreign nationals may be designated as arbitrators, that the arbitrators shall act as amiable compositors one who can bring together eliminating difference if the parties so decide and if they may do so under the law applicable to the arbitration, and that "legal persons of public law", such as foreign trade

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[80] Published in January 1985 (the pamphlet contains the documents as revised on September 26,1984). The pamphlet also contains a flyleaf setting out the Schedule of Costs, as in January 1985.

[81] The Convention was complemented by the Agreement relating to the Application of the European Convention on International commercial Arbitration signed in Paris on December 17, 1962. There exist also Arbitration Rules for certain categories of Perishable Agriculture products of July 1979, sponsored by the UN Economic Commission for Europe (ECE/AGRI/43).

[82] Austria, Bulgaria, Hyelorussian S.S.R., Czechoslovakia, Cuba, France, Germany (Federal), Hungary, Italy, Poland, Romania, Ukrainian S.S.R., Upper Volta, U.S.S.R. and Yugoslavia.

corporations of the countries of state-planned economy, have the right to conclude valid arbitration agreements.

7(7). ARBITRATION IN THE SOCIALIST COUNTRIES:

In the socialist countries arbitration tribunals are constituted for dealing with commercial disputes between the indigenous foreign trade organisations and business enterprises of other countries, with which they enter into export and import transactions[83]. In former Soviet Union two international arbitration tribunals exist, both constituted at the USSR chamber of Commerce and Industry in Moscow, viz. the Arbitration court and the Maritime Arbitration Court which had jurisdiction over claims arising from contracts of carriage of goods by sea, bills of lading, charter parties, marine insurance policies and further, speaking generally, over claims which in England would fall within the province of Admiralty jurisdiction[84]. Similar arbitration tribunals exist in Poland, Czechoslovakia, East Germany, Romania, Hungary, Yugoslavia and China[85]. In their negotiations with business enterprises of the

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[83] See International Commercial Arbitration, 3rd ed. (1985), vol. I, Pt. III.

[84] There exists a maritime arbitration tribunal for Poland, East Germany and Czechoslovakia; its seat is in Odynia (Poland) and its jurisdiction is similar to that f the USSR Maritime Arbitration Court.

[85] Thomas W. Hoya, East-West Trade Com[illegible] Law, American Soviet Trade (1984) pp. 324-325. In addition the following States have signed the Convention:
Belgium, Denmark, Finland, Spain, Turkey. The United Kingdom has neither signed nor ratified the Convention. The Convention attempts to overcome difficulties in the constitution of arbitral tribunals and in arbitration procedure, particularly in trading relations between countries of different economic order. The Convention provides that the parties to an arbitration agreement shall be free to submit their dispute to a permanent arbitral institution or to an ad hoc constituted tribunal. It further contains rules for the arrangement of arbitration if the parties cannot agree on the co-operation with another in making the necessary arrangements for the arbitrations. In particular, a special Committee is constituted which consists of three members, one designated by the International chamber of commerce, the other by the countries in which no national committees of the ICC exist i.e. mainly the socialist countries, and the chairman being a member of one of these two groups in rotation; the chairmanship changes every two years. The function

western countries, the foreign trade organisations of the socialist countries try to obtain agreement to clauses submitting disputes to the arbitration tribunals of their own country. Since these tribunals have a reputation for fair and impartial dealings in purely commercial matters, some exporters in the western countries do not object; others whose object will normally find that the foreign trade organisation under the rules of the ICC Court of Arbitration, or to "neutral" arbitration, e.g. in Sweden or Switzerland. In Yugoslavia there is no difficulty in obtaining the consent of the indigenous trade corporations, which enjoy considerable independence from the State, to arbitration outside the country.

Arbitration in the socialist countries differs in some respects from that in the countries of free economy, but following the liberalization policy of many Eastern Countries, these differences are diminishing and likely to disappear completely in course of time. The rules governing the constitution of and procedure in the arbitration courts in the Eastern countries are published and most of them are available in English language.

The countries of the Council of Mutual Economic Assistance (CMEA) adopted on May 26, 1972 a revised convention on the Settlement by Arbitration of Civil Law Disputes resulting from Economic, Scientific and Technical Co-operation. Further, in 1975 the Executive Committee of CMEA approved revised uniform Rule for Arbitration Tribunals of the CMEA countries, these Uniform Rules are amended from time to time.

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of the special committee is to appoint the arbitrator or umpire and to settle procedural details of the arbitration if the contract is silent or the parties cannot agree. The Special committee constitutes a bridge between Eastern and Western system of arbitration.

The particulars character of foreign trade arbitration in the socialist countries has raised difficult and delicate problems in the courts of the Western Countries. In the Swiss courts the question arose[86] whether awards of the Arbitration Court of the Czechoslovak Chamber of Commerce in Prague were enforceable in Switzerland under the Geneva Convention of 1927 to which both Czechoslovakia and Switzerland were parties; the Federal Supreme Court of Switzerland held that the fact that the members of the arbitration court were nominated by the President of the Czechoslovak Chamber of Commerce was not against Swiss public policy and that the enforcement of the Czech award could not be refused on that ground. In the English and American courts proceedings have been stayed so that arbitration in Moscow could proceed[87]. The Soviet Foreign Trade Commission - the predecessor of the Moscow Arbitration Court - itself had to consider the plea that the Soviet tribunal and the Soviet party were, in fact, one and the same person and rejected it[88]. In all these cases the courts attached decisive importance to the fact that the defendant, when accepting the arbitration clause, had voluntarily submitted to the jurisdiction of a tribunal in a socialist country; to relieve him of that obligation on the ground that the tribunal was composed in a particular manner, would be contrary to the principle that contracts have to be performed (pacta sunt servanda). Differences in legal concepts between countries of a

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[86] *Ligna Aus senhandelsunternehmen V. Baumgartner & Co.* A. G. BGE 1958 (84), 1, 39.
[87] In *England: Mav & Hassell Ltd. V. Exportles* (1940) 66 L.I.L.R. 103.
[88] *Exportles V. Compagme* Commerciale de Bois a Papier, quoted by Pisar in "Treatment of Communist Foreign Trade Arbitration in Western Courts", International Trade Arbitration (Domke, ed), 1958, 101, 104.

different economic order have been considered by the English courts in another connection[89] and have been held not to infringe English public policy.

7(8). ENFORCEMENT OF AWARDS :

The decision of the arbitrator or umpire is called the award[90]. In many cases the awards are carried out faithfully by the parties, but sometimes it is necessary to ascertain the means by which the award can be enforced in law. In India the Arbitral Awards were recognized and implemented through adoption of the Arbitration (Protocol and Convention) Act 1937, Foreign Award (Recognition and Enforcement) Act 1961, Indian Arbitration Act 1940 etc. But enacting Arbitration and Conciliation Act 1996 the above-mentioned laws are repealed in arbitration matters. However the new law incorporates New York convention Award, Geneva Convention Award by which the enforcement of Awards will be made. The said Act itself in its chapter VIII contains the provision for enforcement of Awards.

In England an English award is normally enforced in the same manner as a judgment; the only difference is that leave of the court must first to be obtained for the execution of an award. Leave is granted by a master of the court in a simple and inexpensive procedure, which is commenced by originating summons. In exceptional cases, e.g. when the submission was oral, an action for the enforcement of the award has to be brought which is heard by the judge[91].

More important in international trade relations is the question whether an English award can be enforced in a foreign country where a foreign

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[89] *Luther V. Sagor* (1921) 3 K.B. 532, 539.
[90] In French it is called la Sentence, the same word as is used for a court decision.
[91] Arbitration Act 1950, S. 26

award can be enforced in the English jurisdiction. As matters stand at present, it can be stated that in many cases the enforcement of a foreign award is possible, but the legal method of enforcement varies. As far as the enforcement of a foreign award in England is concerned - and the same applies to the enforcement of an English award in the respective foreign countries - one distinguishes between the enforcement under the Geneva Protocol and Convention and that under the New York Convention. Both aim at making the enforcement of a foreign award as simple as that of an award made within the jurisdiction and to admit it to execution under the same conditions. Enforcement under the Geneva Protocol and Convention is regulated by the Arbitration Act 1950 and these awards are known as foreign awards. Enforcement under the New York convention of 1958 is possible under the Arbitration Act 1975 and these awards are referred to as convention awards. The New York convention is designed to supersede the Geneva Protocol and Convention by one instrument and, at the same time, to make more effective the international recognition of arbitration agreements and foreign arbitral awards and the enforcement of the latter. In addition to these two methods, a foreign arbitral award made in a country to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 is made applicable can be enforced in England and Wales upon registration, provided that it is enforceable in the country in which it was made, in the same manner as a judgment[92]. Speaking generally, it is easier to enforce a foreign arbitral award than it is to enforce a foreign judgment, particularly if the recognition and enforcement is governed by the New York Convention.

[92] Foreign Judgments (Reciprocal Enforcement) Act 1933, S. 10A, added by the Civil Jurisdiction and Judgments Act 1982, Sched. 10, para 4

An arbitration award can be enforced against property in foreign state for the time being in use or intended for use for commercial purposes[93]. In India the Arbitral Awards were recognized and implemented through adoption of the Arbitration (Protocol and Enforcement) Act 1937, Foreign Award (Recognition and Enforcement) Act 1961, Indian Arbitration Act 1940 etc. But enacting Arbitration and Conciliation Act 1996 the above mentioned laws are repl-ed in arbitration matters. However the new law incorporates New York Convention Award, Geneva Convention Award by which the enforcement of Awards will be made. The said Act itself in its chapter VIII contains the provision for enforcement of Awards.*

7(9). THE GENEVA PROTOCOL AND CONVENTION[94]:

Two international agreements have been concluded in Geneva, the protocol on Arbitration clauses of 1923, and the convention on the Execution of Foreign Arbitral Award of 1927[95]. Both agreements have been ratified by a number of countries, amongst them the United Kingdom. By the Arbitration Act 1950 statutory effect is given in the United Kingdom to the protocol on Arbitration Clauses of 1923 by sections 4(2) and 35, and to the Convention of the Execution of Foreign Arbitral Awards of 1927 by section 35. The Protocol is contained in the First Schedule and the Convention in the Second Schedule to the Act of 1950.

Under the Convention a foreign award can be enforced in the English jurisdiction in the same manner as an English award, provided the

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[93] State Immunity Act 1978, S. 13.

[94] India has also passed a law; The Arbitration and Conciliation Act 1996 which repeals this convention on (earlier it was adopted)

[95] They were sponsored by the League of Nations.

* Supra Page 77.

arbitration agreement is valid under its proper law and certain other requirements have been satisfied, but the enforcement will be refused if the award is contrary to English public policy. The application of these provisions depends on reciprocity being granted by the country where the award is made. Awards are mutually enforceable under the Convention in the various countries[96].

7(10). THE NEW YORK CONVENTION:

On June 10, 1958, a Convention on the Recognition and Enforcement of Foreign Arbitral Award was approved by a United Nations Conference at New York. New York Convention has been given effect in India by the Foreign Award Act 1961[97]. As many as 70 States have agreed to be bound by the Convention[98] but some States have ratified or acceded subject to reservations, notably specifying that the Convention's application is subject to reciprocity (the reciprocity reservation) or that it is limited to business and commercial transactions (the commercial reservation).

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[96] Antigua and Barbuda, Australia, Bahrain, Bangladesh, Belgium, Belize, Czechoslovakia, Denmark, Dominica, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Grenada, Guyana, India, Republic of Ireland, Israel, Italy, Japan, Kenya, Luxembourg, Malta, Mauritius, Netherlands, New Zealand, Pakistan, Portugal, Romania, Saint Christopher and Nevis, St. Lucia, Spain, Sweden, Switzerland, Tanzania, Thailand, United Kingdom of Great Britain ad Northern Ireland, Western Samoa, Yugoslavia, Zambia. Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Falkland Islands Dependencies, Gibraltar, Hong Kong, Monteserrat, Turks and Caicos Islands, Antigua and Barbuda, Austria, Bahamas, Bangladesh, Belgium, Belize, Czechoslovakia, Denmark, Dominica, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Grendna, Guyana, India, Republic of Ireland, Israel, Italy, Japan, Kenya, Luxembourg, Malta, Mauritius, Netherlands (including Curacao), New Zealand, Pakistan Portugal, Romania, Saint Christopher and Nevis, St. Lucia, Spain, Sweden, Switzerland, Tanzania, Thailand, United Kingdom of Great Britain and Northern Ireland, West Samoa, Yugoslavia, Zambia.

[97] Now this Act has been repealed and the Arbitration and conciliation Act, 1906 has come into force.

[98] These reservations are made by virtue of Art. I(3) of the New York Convention.

The New York Convention represents great progress in the field of international arbitration, when compared with the Geneva provisions. They were founded on the requirement of reciprocity, which made it necessary to conclude bilateral agreements between states before the Geneva provisions could become operative in their jurisdictions. The requirement of reciprocity guaranteed by bilateral treaties is abandoned by the New York Convention which applies, in principle, to every foreign award, i.e. an award made in the territory of any State other than that in which its recognition and enforcement is sought, but, as already observed, when ratifying the Convention or acceding to it some States have limited the application of the Convention to award made in the territory of other Member states (Art. I)[99]. It has rightly been said that the reservation is self-liquidating since its effect will abate as more and more States ratify the Convention.

Further, whilst the application of the Geneva Protocol of 1923 depended on the parties to the agreement being subject to the jurisdiction of different States which were members of the Protocol, the New York Convention no longer stipulates that requirement and applies to all agreements in writing under which the parties undertake to submit arbitration.

7(11). ENFORCEMENT OF AWARD IN THE ABSENCE OF INTERNATIONAL REGULATION:

In countries which do not adhere to the international regulation, the position is the following: An arrangement for the reciprocal enforcement of money judgments has been made with some common wealth countries under

[99] Refrences are to the New York Convention.

the Administration of Justice Act 1920 and this arrangement is extended arbitral awards which, under the law in force where they are made, are enforceable in the same manner as judgment[100]. A similar provision is contained in the Foreign Judgments (Reciprocal Enforcement) Act 1933[101]. In these cases the enforcement of the award is by simple registration in the country in which enforcement is sought. This method is satisfactory because it is inexpensive and requires the observation of few formalities. The method of registration is available in Australia, New Zealand, the Canadian Provinces of Newfoundland and Saskatchewan and Gibraltar, and many other parts of the common wealth[102]. In those parts which do not admit the system of registration, e.g. Canada (with the exception of Newfoundland and Saskatchewan), and in the foreign countries outside the Common wealth which have not ratified the Geneva or New York Conventions with effect to the United Kingdom, the enforcement of English awards depends entirely on private international law and might meet with considerable difficulties[103].

7(12). MARITIME ARBITRATION:

After the successful experiment of Arbitration in business matters the I.C.C has established International Maritime Arbitration Organisation (IMAO). The I.C.C and the Comite Maritime International (CMI) have jointly produced a set of rules for maritime arbitration. The administration of

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[100] 1920 Act, S. 12 (1).

[101] 1933 Act, S. 10A, added by the Civil Jurisdiction and Judgments Act 1982, Sched. 10, Para 4;

[102] This method is alternative to those admitted by the Geneva Convention of 1927 or the New York Convention of 1958.

[103] A foreign award which, for one reason or another, cannot be enforced in the United Kingdom registration may be enforced by action (which may be in personum or in rem) but the cause of

arbitration cases submitted under the ICC/CMI. Arbitration Rules is entrusted to an organization common to the two institutions, the IMAD. The Rules enforce since 1978, are designed for the conduct of arbitration disputes relating to maritime affairs including inter alia charter parties. Contracts of carriage of goods by sea or of combined transport, contracts of marine insurance, salvage and general average, Ship Building and Ship repairing contracts, contracts of sales of vessels and other contracts creating regrets in vessels.

The standard clause recommended by I.C.C States:

"All disputes arising from this contract/charter party shall be finally settled in accordance with the I.C.C/C.M.I. International Maritime Arbitration Rules by one or more arbitrators appointed in accordance with the said Rules[104]."

Thus we reach at the conclusion that the world order is in favour of alternative resolutions.

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the action is the agreement of the parties to submit to arbitration and not the award itself: The Saint Anna (1983) 1 W.L.R. 895.

[104] I.C.C Publication No. 800. p. 18.

CHAPTER-3

MARRIAGE

اپنے حدود سے نہ بڑھے کوئی عشق میں

جو ذرہ جس جگہ ہے وہیں آفتاب ہے

"No one should cross the limit

Everything has its own importance."

CH-3: MARRIAGE AND VIEW OF IMARATE SHARIA

1.INTRODUCTION:

In Arabic marriage is known as *Nikah,* which literally means joining together. In the Holy Quran it has been described as *hisn* (that is a fort), which means that it affords social , physical and moral protection to the couple joined together in wed lock, from the evil forces and carnal desires.

Marriage is a legal union of a man and a woman as husband and wife. It is a contract according to the form prescribed by law by which a man and woman capable of entering in to such contract, mutually engage with each other to live their whole lives in state of union. The word also signifies the act, or formal proceeding by which persons are wed locked with each other. Islam attaches great sanctity to marriage. The purpose of marriage is the establishment of a happy home the spouses are enjoined to guard their chastity and be considerate and loving.[1]It is necessary for the continuance of generation as it provides the means of procreation of children which is the source of survival of human race.Almighty Allah says."

وَأَنكِحُوا۟ ٱلْأَيَـٰمَىٰ مِنكُمْ وَٱلصَّـٰلِحِينَ مِنْ عِبَادِكُمْ وَإِمَآئِكُمْ ۚ إِن
يَكُونُوا۟ فُقَرَآءَ يُغْنِهِمُ ٱللَّهُ مِن فَضْلِهِۦ ۗ وَٱللَّهُ وَٰسِعٌ عَلِيمٌ ﴿٣٢﴾

"And marry such of you
As are solitary

[1] Professor Masoodul Hasan"The digest of the Holy Quran'(N.Delhi:Kitab Bhawan,1992)2nd ed.p.291

And the pious
Of yourselves
And maid servants.
If they be poor
Allah will enrich them
Of His bounty.
Allah is of ample means, aware."[2]

He further revealed:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانْكِحُوا مَا طَابَ لَكُم مِّنَ النِّسَاءِ

"And if ye fear that
ye will not deal fairly
by the Orphans,
marry of the women,
who seem good to you."[3]

Bukhari reports that a group of three men came to the houses of the wives of the Prophet (SAW) asking how the Prophet Worshipped (Allah), and when they were informed about that, they considered their worship insufficient and said, " Where are we from the Prophet as his past and future sins have been forgiven." One of them said, " I will not marry forever". Allah's messenger came to them and said "Are you the same people who said so-and - so ? By Allah I am more submissive and more afraid of Him than you ; yet I fast and break my fast , I do sleep and I also marry women . So he who does not follow my tradition is not from me."[4] Urwa (Raz.) says that he asked

[2] M.M. Pickthall,'Holy Quran S 24 A 32
[3] Ibid. A .3
[4] Mohammad bin Abdullah Bukhari 'BukhariSharif' TransDr. Mohd.Muhsin Khan (N.Delhi: Kitab Bhawan. 1984) 5th ed.VII p.7

Ayesha (Raz)about statement of Allah in sura 4 V 3[5] Ayesha said . "O my nephew ; this verse has been revealed in connection with an orphan girl under the guardianship of her guardian who was attracted by her wealth and beauty and intend to marry her with a dower(*mahr*)less than what other women of her standard deserve . So they (such guardians) have been forbidden to marry them unless they do justice to them and give them their full dower, and they are ordered to marry other women instead of them."[6]

2. NATURE OF MUSLIM MARRIAGE:

Jurists are of the different view regarding the nature of marriage. Ahadith are Quoted that one who marries, completes half of his religion it now rests with him to complete the other half by leading a virtuous life in constant fear of Allah.

Another tradition says -

"There are three persons whom the Almighty Allah himself has undertaken to help, first he who seeks but his freedom, second, he who marries ... "

It is also said that there is no act of devotion that has remained prescribed for us, since the time of Adam (AS) up to this moment and will be continued in paradise except marriage and faith[7].

Traditions show that marriage has sacramental aspect also. However jurists have different opinion about its nature. Imam Abu Hanifa (Rah) considers the marriage as partaking of both sacrament as well as worldly affair[8]. Hanafis say that it has sacramental aspect because the recitation of sermon and organization of walima are *Sunnah*. Again it is detestable to get the marriage dissolved. The performance of waiting period and legal

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[5] "And if ye fear that ye will not deal fairly by the orphans, marry of the women who seem good to you ----" Thus it is more likely that ye will not do injustice (Pickthall)

[6] Bukhari op. cit.Vol.VII p. 2

[7]. Darrul Mukhtar, Trans B. M. Dayal (N.Delhi: Kitab Bhawan, 1992,) II. p. 12.

impediment in remarriage makes the marriage other than the ordinary contract[9] . Moreover each and every Prophet was married. Prophet Mohammad (SAW) said "O assembly of youths, you marry as it gives restrain to the passion and protection to the eye.[10]

Shafeyee(Rah) considers the marriage as a purely civil contract. It is only permitted (*mabah*) and may be left for extra worship (*nafl*)[11]. If it were obligatory the Prophet (SAW) would have forbidden his companions who were not married. The verse 8 of sura 73[12] also says to give away the woman[13]. Further the non-gamous quality of Yahya is appreciated in Holy Quran[14]. Again, Allah has warned –

زُيِّنَ لِلنَّاسِ حُبُّ ٱلشَّهَوَٰتِ مِنَ ٱلنِّسَآءِ وَٱلْبَنِينَ

"Beautified for mankind is love for the Joys (that come) from women and offsprings—"[15]

According to justice Mehmood marriage is a civil contract. Justice Sulaman analysing Mehmood' s opinion says that the Judge accordingly felt compelled to make a deduction from certain privileges governing sale of goods and applying them to the contract of marriage.

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[8] Fathul Bari, Vol. IX p.104
[9] Maulana TaqiUsmani'Darse Tirmizi'(Deoband:Darulkitab,1412A.H.).III p.344.
[10] Nihaya, Vol. I p. 160, Quotetd by Darse Tirmizi, Vol.III 347
[11] Darse Tirmizi p. 344
[12] Holy Quran
[13] But this infrence is weak, as the Prophet himself has married.
[14] Holy Quran S 3 A 39

فَنَادَتْهُ ٱلْمَلَٰٓئِكَةُ وَهُوَ قَآئِمٌ يُصَلِّى فِى ٱلْمِحْرَابِ أَنَّ ٱللَّهَ يُبَشِّرُكَ بِيَحْيَىٰ

مُصَدِّقًۢا بِكَلِمَةٍ مِّنَ ٱللَّهِ وَسَيِّدًا وَحَصُورًا وَنَبِيًّا مِّنَ ٱلصَّٰلِحِينَ ﴿٣٩﴾

Mufti Shafi in "*Maariful Quran*" also express his opinion that it (marriage)is only permitted thing (mabah) and one who is so devoted to Allah like Yahya (AS) may not marry.

Justice Sulaiman says-

"The term of reasoning based on the analogy of sale has naturally been very severely criticized at pp. 148-9 in *Wajid Ali Khan'* s case by the Qudh Bench,and also by Mr. Ameer ali."[16]

Justice Sulaiman again quotes J. Mehmood

"The marriage cannot be regarded as purely a sale of person by the wife[17]".

Justice Sulaiman Further says –

"It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that a marriage is not regarded as a mere civil contract, but as a religious sacrament."[18]

Prof. Tahir Mehmood is of the view that 'there is a popular misconception that no religious significance or social solemnity attaches to a Muslim marriage and that it is a mere "civil contract " this is not true. Of course, Islam does not regard marriage as a sacrament (*sanskar*) in the Hindu Religious sense of term. However, the Prophet did describe marriage (*nikah*) as his Tradition as a matter of fact it is only the form of the Muslim marriage that is contractual and non-ceremonial marriage itself, as a concept, is not merely a contract'.

Thus "the ultimate analysis... can be said that the marriage in Islam is neither purely a civil contract nor sacrament. It is devoid of none but the blending of the two"[19].

Justice Qadiruddin Ahmad[20] says that in marriage if religious ritual is not essential part of the transaction, it does not mean that it has no sacred

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[15] S 3 A 14

[16] *Anis Begam &others V. Malik Mohammad Istafa wali Khan* L .J.R. (High Court) 1933, p. 1086

[17] Ibid p. 1088

[18] Ibid

[19] Aquil Ahmad' s Muslim Law – Dr. I. A. Khan (Allahabad:Centred Law Agency)16th ed. p. 52

[20] Rahman.p. 542

and no higher religious purpose, enjoining the sanctity of religion and pleasure of God. There is a sanctity attached from the beginning to the end by conceptions of rights and obligations which, if treated without the holiness which they possess in their nature, would be profane and cease to be Islamic in character.

THE VIEW OF IMARATE SHARIA :

Marriage is originally an act of devotion but incorporates the aspect of contract also. This is the point where belief is completed. For the rest they concure with the Hanafi view. Thus the view of Imarate Sharia is the crux of the views of the Hanafi jurists

3. CAPACITY TO MARRY AND GUARDIANSHIP :

It is to be seen here whether there is need of guardianship in marriage or a girl is free to marry.

(1). HANAFI VIEW:

Hanafis say that it depends upon the age of the girl, if she is minor, the guardianship is needed. Where she is major it is immaterial that the marriage is of spinster or window, the consent is necessary. The marriage performed with the consent of the father of a girl is void provided she refuses to cohabit with her husband[21]. Morcover the women who are divorced if they want to marry with the divorcing husband may marry provided the divorce is not more than two and the guardians are forbidden to intervene[22]. The order

[21] Marriage of Khausa , D/o Khidam , Bukhari p. 52
[22] Holy Quran S.2 V.232.

made to the women to keep away from marriage in *Iddat* (of death) contains the permission to do the rightful act (marriage) after waiting period. This permission is granted to women[23] and not men. The marriage of the Prophet (SAW) with Umme Salma (Raz) was not made by her guardians[24]. The offer of a woman to the Prophet and her marriage with a companion of the Prophet shows that woman is free to marry herself[25]. The marriage of Hafsa (Raz), the niece of Ayesha (Raz) was arranged by her without the guardian[26]. The marriage made without the guardian was valid in the Caliphate of Ali (Raz)[27]. Thus for marriage a woman who is of sound mind attained puberty and is not slave can enter in-to marriage contract[28]. However Imam Yusuf((Rah)and

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وَإِذَا طَلَّقْتُمُ ٱلنِّسَآءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَن يَنكِحْنَ
أَزْوَٰجَهُنَّ إِذَا تَرَٰضَوْا۟ بَيْنَهُم بِٱلْمَعْرُوفِ ۗ ذَٰلِكَ يُوعَظُ بِهِۦ مَن كَانَ
مِنكُمْ يُؤْمِنُ بِٱللَّهِ وَٱلْيَوْمِ ٱلْءَاخِرِ ۗ ذَٰلِكُمْ أَزْكَىٰ لَكُمْ وَأَطْهَرُ ۚ وَٱللَّهُ
يَعْلَمُ وَأَنتُمْ لَا تَعْلَمُونَ ﴿٢٣٢﴾

[23] Holy Quran S 2 A 234

وَٱلَّذِينَ يُتَوَفَّوْنَ مِنكُمْ وَيَذَرُونَ أَزْوَٰجًا يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ
وَعَشْرًا ۖ فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَلَا جُنَاحَ عَلَيْكُمْ فِيمَا فَعَلْنَ فِىٓ أَنفُسِهِنَّ
بِٱلْمَعْرُوفِ ۗ وَٱللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ ﴿٢٣٤﴾

[24] Tahavi , Vol . II p. 8.
[25] Bukhari , Vol. VII p. 49 (A lady came and presented herself to the Prophet (SAW) for marriage. Having seen the silence of the Prophet (SAW) a companion offered for marriage with whom the marriage was made).
[26] Tahavi , Vol II p. 6. Here the tradition also shows that a woman can be guardian in marriage.
[27] Kanzul unmal , Vol. XI p. 532.
[28] Almarganani. 'The Hedaya' Tr. Charles Hemilton (Delhi: Islamic Book Trust, 1982) p.34

Imam Mohammad (Rah) consider the consent of guardian as necessary.

ii). MALIKI VIEW:

As per Hedaya, Imam Malik is of the view that a woman can by no means contract herself in marriage to a man in any circumstances, whether with or without the consent of her guardians; neither she is competent to contract her daughter or her slave, nor to act as a matrimonial agent for any one, so as to enter into a contract of marriage on behalf of her constituent[29] . But the two Traditions reported in *Muwatta* Imam Malik show that woman do not need guardian's consent for marriage.But no one has taken these traditions as negation of the consent of guardians[30]. Anyway Dr. Tanzilur Rehman after a long discussion concludes the Maliki view in the following way –

"Imam Malik in his *Muwatta* has also reported two other Traditions (where virgin daughters were given in marriage without their consent)If each of the two Traditions be examined in the light of the social background of Medina , it shall become apparent that these Traditions merely indicate the general custom and usage in vogue in Medina. The consent and permission of a guardian as a condition precedent to a valid marriage contract can not be put for word as an explicit religious mandate".

In the light of the above analysis it may be concluded that Imam Malik (Rah) considers the permission of a guardian necessary for the completion of a marriage and not for validating it. Ibne Rushd and other Egyptian Maliki jurists appear to conform this veiw. Maliki Jurists of Iraq, however hold that the permission of a guardian is a condition precedent to a

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[29] . Ibid

[30] Muwatta (Kitab Bhavan 1981) p . 266 .

"Sabarah Aslamiya was confined a few nights (Fortnight) after the death of her husband , when this was reported to the Apostle of Allah , he said ; thou hast become eligible , marry thou wilt"

valid marriage [31].

It is submitted that the view of Tanzilur Rehman is better as it is more practicable

iii). SHAFEYEE VIEW :

The scholars of this school say that the woman is not allowed to marry her without the consent of guardian . They rely upon the Traditions of Abu Musa Ashari (Raz) and Ayesha (Raz) in which it is said that there is no marriage without the guardian. And a woman whose marriage is without the permission of a guardian, the marriage is void the marriage is void and the third time, the marriage is void. Moreover the Almighty Allah in sura 24 V. 32 has revealed "And marry such of you ...." has addresses the guardians and not the parties to the marriage. Again in sura 2 A 221 Allah has revealed-

وَلَا تَنكِحُوا ٱلْمُشْرِكَٰتِ حَتَّىٰ يُؤْمِنَّ

"Wed not idolatresses till they believe, for lo! A believing ----- addresses the guardians and not the parties. Further Almighty Allah revealed–"And when ye have divorced women and they reach their term ; place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness...". Thus the verses guide the guardians, which indicates that they have the capacity to give their wards in marriage.

iv). HAMBALI VIEW :

It is said that Hambalis are also of the similar view as Malikis or Shafeyees are. However there is difference between Hanafis and other scholars. The aspect of consent and guardianship in marriage is more favourable for women in Hanafi school .

v). IMARATE SHARIA'S VIEW:

[31] Justice Tanzilur Rehman,'A Code of MuslimPersonal Law (Karachi:Hamdard Academy

Like Hanafi school the Imarate Sharia allows major women to marry in their status (kufu) according to their wish. The founder of Imarate Sharia Abul Mahasin Mohd. Sajjad has mentioned this view.[32] However the minors marriage need consent of their guardians. In the presence of near guardians ijbar the consent of remote one is ineffective. Mere silence of guardian is not consent. How-ever it is equal to consent if a major woman do so. Where there is undue influence upon guardian for consent the sending to the bride to her marital home is implied consent.[33] While in another case the cohabitation of the marrying parties was not treated as consent of the guardians[34]. Apparently there is contradiction between two and there is need of clarification from Imarate Sharia . In the case of *Shama Perveen V .Anwar Hasan*[35] the Qazi held that in marriage of vergointacta the silence is equal to consent provided guardian of the bride is taking the consent . But in all those cases where non guardians (*awlia*) are taking the consent the silence is not enough to prove the consent [36].But the newly published *Fatawa* book[37] treats the silenced of a victim of *aqde fazuli*[38] as her consent. So the Imarat's view is not encouraging for women esp in the time when there is demand of gender justice all over the world. Here the schools of jurisprudence other than Hanafi School do not seem to be in accordance with the need of the time while Imarate Sharia is at par.

vi). AGE OF PUBERTY:

1978)I,43,44

[32] Fatawa Imarate Sharia pp. 105 ,106 & 113

[33] Ibid p.109

[34] Ibid p.102

[35] 35/12806/1409AH

[36] . Fatawa Imarate Sharia (1998) p. 113

[37] Ibid

[38] Ibid p. 107 (Istifta no. 69) *Aqde Fuzuli* means where marriage is solemnized without the authority of the parties (or guardians in case of Minority).

Every person governed by Muslim Law is entitled to marry. No injunction can be granted to restrain marriage on a Muslim who is of age[39] or who has attained the puberty[40] . The age of puberty in Muslim law as the judicial committee ovserved, referring *Hedaya*, that the earliest age is nine years for girl and 12 years for boys [41]. Tayabji says[42] that in the absence of evidence of attainment of puberty the age of competence is 15 years for the girl.

4. LEGISLATIONS

The following are the enactments made in different countries[43] regarding age of puberty -

(I). TURKEY:

Art 88 of The Turkish Civil Code 1926 fixes the age of marriage as 17 and 15 years respectively of boys and girls . However guardians may apply for early marriage and court may permit on 15 and 14 years respectively.

(II). CYPRUS:

The age of marriage is 18 & 17 years of boy and girl respectively. Before 17 years the marriage of girl is not permitted unless there is consent of guardian. However the guardian may take permission of the court on the age 15&14 years respectively.

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[39] *Muhammad Yamin V. Razia* (1919) 17 All. L. J .1138

[40] Pri nciples of Mohammedan Law – Edited by M. Hidayatullah and Arshed Hidayatullah , (Bombay: N.M.Tripathi Pvt. Ltd)18thed. p. 282.

[41] *Sadiq Ali Khan V. Jai Kishore* (1928) 30 Bomb. L. R. 1346
ibid P . 283 also in

[42] Faiz Badruddin Tyabj 'Muslim law' Muhsin Tayyabji ed . (Bombay : N .M .Tripalhi Pvt . Ltd . 1968) P .52 Also see *Atkia Begum V. Md .Ibrahim* AIR1916 PC 250

(III). EGYPT:

For marriage the age must be 18 & 16 of a boy and a girl, if it is complied the parties will get any relief from the Court. However the offspring will be considered legitimate.

(IV). JORDAN:

In Jordan also the age of marriage is 18 &16 years of man and a woman. For marriage, between whom 20 years difference exist, the permission of Qadhi is necessary.

(V). SYRIA:

In Syria the age of marriage of man and woman are 18 and 17 years. Where there is age difference the permission of Court is necessary .

(VI). TUNISIA:

The marriage age is 20 years. But Court may permit boy & girl of below 20 years and 17 years respectively. Even the girl may marry before 17 years; provided she gets the permission of the guardian.

(VII). MORACCO:

In Moracco the marrying age is 18 and 15 years of male & female respectively. In order to get the early marriage the consent of guardian is necessary.

(VIII). IRAQ:

Normally the minimum age for marriage is 18 years. For early marriage the court may permit; provided the parties have attained puberty and guardian consent.

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[43] Rehman pp. 62-67 &Prof.Tahir Mehmood,'Statutes of Personal Law in IslamicCountries-History. text and analysis' (Delhi:I. I.R.C.,1995)IInd ed. pp.101-179

(IX). IRAN:

The minimum age of marriage is 18 & 15 years of male and female respectively . Marriage prior to the said age is punishable under Art –2 of the marriage law 1931.

(X). CEYLON:

For registration of marriage the female party must have attained the 12 years of age. However for registration of minor marriage permission of the Qazi of the minor's area is necessary.

Thus we see that failure to obtain the necessary permission for ijbar impedes registration of the marriage and even renders the parties liable to statutory penalties but it does not invalidate the marriage. The modern legislation relating to marriageable age has nearly abolished the right of marriage guardian to contract a valid marriage by *ijbar*. How-ever in India a guardian may still validly give his minor ward in marriage by ijbar not withstanding, the punitive sanctions attached to the marriage of minors (boys below 18 years of age and girl below16) by the Indian Child Marriage Restraint Act 1929. Any way, a girl so contracted in marriage during minority may repudiate the marriage even if she is given in the marriage by her father or grand father, provided marriage is not consummated.

5. FORMALITIES:

In marriage the following ingredients are to be fulfilled-

(1). Offer and acceptance (Ijab wa Qubul).

(2). Dower

(3). Witnesses

(4). Same meeting

(1). OFFER AND ACCEPTANCE:

The offer and acceptance is also necessary for marriage . There is no difference among the scholars of different schools in this regard. The only difference is that where the offer or acceptance is vitiated by coercion, undue influence, fraud, mistake or misrepresentation, what will happen? The Hanafis consider the marriage as valid. The scholars of other Schools do not agree with the Hanafis view. The former's view is taken from the Tradition where the Prophet (SAW) said[44], "there are three things, which whether done in joke or earnest, shall be considered as serious and effectual, Ist marriage; the 2nd divorce and the 3 rd taking back in *nikah*." while other scholars rely upon Tradition reported by Ayesha (Raz) who says[45], "I have heard the Prophet of God say there is no divorce and no emancipation by compulsion"

Imarate Sharia also considers the offer and acceptance as necessary for marriage. Where the marriage has been solemnized by the consent of the parties was declared void one the ground that there was no offer. So offer must be express other wise the marriage will not be valid[46].

Here the view of Imarate Sharia does not seem good as the present day situation demand the acceptance of implied offer. If any one goes by bus on the way from Aligarh to Delhi, there cannot be any formal offer and acceptance. There is an open offer when the bus is driven. The riders act is equivalent to the acceptance. More over the marriage made by non-authorized persons (*Aaqde Fuzuli*) is depended upon the verification of the parties[47].

(2). DOWER:

Dower is given by the husband to the wife as a mark of respect. It is considered necessary before the every School of Muslim Law. The difference is only of amount, It is to discussed in the separate chapter of dower.

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[44] Balughul Maram
[45] Tayabji . pp . 53 .
[45] *Akhtari Bano V. Haji Mohammad Siddique* 166/15849/1416AH
[46] *Akhtari Bano V. Haji Mohammad Siddique* 166/15849/1416AH

(3). WITNESSES:

Abdullah Ibne Abbas(Raz) narrates[48]

But there is no detail of witnesses of marriage in the Holy Quran. About general witnesses the Holy Quran has revealed-[49]

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓا۟ إِذَا تَدَايَنتُم بِدَيْنٍ إِلَىٰٓ أَجَلٍ مُّسَمًّى فَٱكْتُبُوهُ ۚ
وَلْيَكْتُب بَّيْنَكُمْ كَاتِبٌۢ بِٱلْعَدْلِ ۚ وَلَا يَأْبَ كَاتِبٌ أَن يَكْتُبَ كَمَا عَلَّمَهُ ٱللَّهُ ۚ
فَلْيَكْتُبْ وَلْيُمْلِلِ ٱلَّذِى عَلَيْهِ ٱلْحَقُّ وَلْيَتَّقِ ٱللَّهَ رَبَّهُۥ وَلَا يَبْخَسْ مِنْهُ شَيْـًٔا ۚ
فَإِن كَانَ ٱلَّذِى عَلَيْهِ ٱلْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَن يُمِلَّ هُوَ
فَلْيُمْلِلْ وَلِيُّهُۥ بِٱلْعَدْلِ ۚ وَٱسْتَشْهِدُوا۟ شَهِيدَيْنِ مِن رِّجَالِكُمْ ۖ فَإِن لَّمْ يَكُونَا
رَجُلَيْنِ فَرَجُلٌ وَٱمْرَأَتَانِ مِمَّن تَرْضَوْنَ مِنَ ٱلشُّهَدَآءِ أَن تَضِلَّ إِحْدَىٰهُمَا

أَن تَضِلَّ إِحْدَىٰهُمَا فَتُذَكِّرَ إِحْدَىٰهُمَا ٱلْأُخْرَىٰ ۚ وَلَا يَأْبَ ٱلشُّهَدَآءُ إِذَا مَا دُعُوا۟ ۚ
وَلَا تَسْـَٔمُوٓا۟ أَن تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰٓ أَجَلِهِۦ ۚ ذَٰلِكُمْ أَقْسَطُ
عِندَ ٱللَّهِ وَأَقْوَمُ لِلشَّهَـٰدَةِ وَأَدْنَىٰٓ أَلَّا تَرْتَابُوٓا۟ ۖ إِلَّآ أَن تَكُونَ تِجَـٰرَةً
حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا ۗ
وَأَشْهِدُوٓا۟ إِذَا تَبَايَعْتُمْ ۚ وَلَا يُضَآرَّ كَاتِبٌ وَلَا شَهِيدٌ ۚ وَإِن تَفْعَلُوا۟ فَإِنَّهُۥ
فُسُوقٌۢ بِكُمْ ۗ وَٱتَّقُوا۟ ٱللَّهَ ۖ وَيُعَلِّمُكُمُ ٱللَّهُ ۗ وَٱللَّهُ بِكُلِّ شَىْءٍ عَلِيمٌ ﴿٢٨٢﴾

"O ye who believe

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[47] *Shama Perveen V. Anwar Hussain* Supra Note
[48] Tirmizi , Vol. II p . 411
[49] S 2 A 282 (this is for evidence generally)

When ye ---
And get two witnesses ,
Out if your own men
And if there are not two men,
Then a man and two women,
Such as ye choose,
For witnesses."

i). HANAFI VIEW:

The Hanafi view regarding the evidence of marriage is described in *Hedaya.* It contains[50] -"---- evidence required is that of two men, or of one man and two women. Whether the case relate to property, or to other rights such as marriage, divorce ---"But Imam Mohammad is of the view that two male witnesses are necessary. However the view of Imam Abu Hanifa is followed by Hanafis[51].

ii). MALIKI VIEW:

Imam Malik (Rah) is of the view that the witnesses are not necessary for performance of marriage. Imam Tirmizi explains the view of Imam Malik (Rah) that Malik (Rah) does not require two witnesses at a time for the proof of marriage. Even one witness who has participated in the marriage ceremony is enough provided he has told the other witness about such performance. Tayabji observes that Maliki law does not place emphasis for witnesses for the validity of marriage contract. But for its declaration amongst the people to make it distinct from adultery which is done secretly[52].

iii). SHAFEYEE VIEW:

[50] Hamilton – Hedaya , p . 354
[51] Darse Tirmizi Vol. III p. 384. Imam Abu Hanifa is of the view that where marriage is with scriptures the witnesses may be non-Muslim.

Imam Shafeyee(Rah) considers the witness as necessary for marriage. According to him two male witnesses are necessary and the evidence of one man and two women is not acceptable. *Hedaya* says that to Shafeyees, the evidence of two women and one man is not enough in the matter of marriage, though it may be in the matter of property[53].*Fatawa Alamgiri* contains the opinion of Shafeyee(Rah) that two male witnesses are necessary for establishment of marriage . The evidence of women is not acceptable.

iv). HAMBALI VIEW:

Ahmad bin Hambal (Rah) is of the view that marriage is established with two male witnesses. However one man and two women can also fulfill the requirement of the witnesses[54]. Thus the views of Hambalis are similar to Abu Hanifa (Rah) in the matter of witnesses.

v). INDIAN JURIST'S VIEW:

The witnesses need not be Muslims[55]. If the witnesses are for proof of marriage it will be made by the non- Muslims also but if it is considered a necessary procedure, the Muslim Law of procedure is not applied in India. Where there are no witnesses, presumption of marriage, with consent of the parties may be inferred provided the parties live like spouses. It is submitted that the view taken by the Court are correct. It is also in consonance with the spirit of Islam that marriage being one of the necessities of life it may not be invalidated due to non availability of the Muslim witnesses

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[52] Rahman.p.78
[53] Hedaya – p. 354
[54] . Darse Tirmizi,p.384
[55] Mohammedan Law , Verma 1953 , p . 44

vi). IMARATE SHARIA'S VIEW:

Imarate Sharia is of the view that witnesses are necessary and they must be knowing the weaker sex. That is why the witnesses of the locality are preferable. The marriage is also to be made in the locality of the female counter part. This will be helpful in the administration of justice. The non-Muslim cannot be the witness of marriage. How ever there is no impediment for Muslims of any character where two Muslims are not available one male and two female can be the witness in accordance with the commandment of the Holy Quran. If there is any marriage without witnesses the marriage will be solemnized again. This process is also inevitable where marriage is performed in the presence of non-Muslims. Where the persons are two but only one of them was present at the time of marriage and the other was informed by the parties and the witness, he will not be treated as witness. However this type of evidence is good before Maliki School.

Thus the view of Imarate Sharia seems good because witnesses of locality know the whereabouts of the parties. In non-Islamic countries like India the evidence of non-Muslims be accepted where there is extreme necessity. The opinion of the Courts that where parties lives like spouses from long time there may be presumption of marriage, seems good. So relaxation is needed although only in extreme cases where it is not possible to produce the witnesses.

In Shama Parveen V. Anwar Husain[56] the plaintiff Shama Parveen who was 18 years old and was given in the marriage of the defendant without

[56] 35/17806/1409AH

her consent. She produced three witnesses in which one was with Qazi at the time of taking permission and other person was with bridegroom's procession. When the witness No.1 asked her to consent she started weeping when more than one hour was passed, a lady, who was standing near by told that she has consented and they moved from there. But soon after this there was abnormal situation in the house. When they asked, they came to know that the bride did not consent and she is crying. Witness No .3 said that when the father of the defendant asked plaintiff's father that why had he called the bridegroom he told that there was chance of impediment from the defendant as his second daughter was also going to be married at that day. When the marriage was performed the bride's condition became abnormal and expressly rejected the performance of marriage. The plaintiff on the other hand told her mother and sister not to marry her with the defendant as he was older than her and not having enough means of subsistence and belong to lower caste she also showed her dissent to her father before the performance of marriage. The defendant had never faced the proceeding in person. Only he had submitted the written statement. Which was not enough for rebutting the saying of the plaintiff. So the Qazi held that it was established that the plaintiff was major and did not consent for marriage and the marriage was performed without her consent. Even after solemnization of marriage she expressly denied to ratify the same. Thus *Shami* says that when the marriage consents are taken by the guardian of the bride (*wali*), the virgin's consent would be her silence. Even the weeping without voice will be considered her consent. But where she is to consent other persons than her guardians (*aulia*) her silence cannot be considered as consent. The marriage of non– virgin (where 2nd marriage is performed) the silence cannot be considered as consent. The marriage performed in contradiction to above rule will be void (*Shami* , Vol . II , pp .

210 – 214) Here the negation of consent was proved she neither performed the local traditions of marriage nor went to her marital home. So the Qazi held that the marriage of Shama Parveen with Hussain was performed without her consent and after the performance she did not ratify. In the eyes of *Sharia* the marriage was not performed and the plaintiff was not the wife of the defendant(Petition was accepted)

COMMENT:

1. In the light of the above judgment it can be said that where bride does not consent marriage will not be deemed to be performed.
2. The Qazi has relied upon the circumstantial evidence while saying "that is why the traditional rites were not performed and she was not sent to the marital home" .
3. Instead of relying upon the foremost primary sources the Qazi has relied upon Shami, which is a commentary upon Hanafi Law it is submitted that the Qazi should have quoted Quran and Traditions.
4. The plaintiff' s father's act must have been condemned who did all the things at the cost of the reputation of bride and bridegroom.

5. PROHIBITIONS:

Among certain persons there is prohibition for marriage. Almighty Allah says ---

وَلَا تَنكِحُوا۟ مَا نَكَحَ ءَابَآؤُكُم مِّنَ ٱلنِّسَآءِ إِلَّا مَا قَدْ سَلَفَ ۚ إِنَّهُۥ كَانَ فَٰحِشَةً وَمَقْتًا وَسَآءَ سَبِيلًا ﴿٢٢﴾

حُرِّمَتْ عَلَيْكُمْ أُمَّهَٰتُكُمْ وَبَنَاتُكُمْ وَأَخَوَٰتُكُمْ وَعَمَّٰتُكُمْ وَخَٰلَٰتُكُمْ
وَبَنَاتُ ٱلْأَخِ وَبَنَاتُ ٱلْأُخْتِ وَأُمَّهَٰتُكُمُ ٱلَّٰتِىٓ أَرْضَعْنَكُمْ وَأَخَوَٰتُكُم
مِّنَ ٱلرَّضَٰعَةِ وَأُمَّهَٰتُ نِسَآئِكُمْ وَرَبَٰٓئِبُكُمُ ٱلَّٰتِى فِى حُجُورِكُم
مِّن نِّسَآئِكُمُ ٱلَّٰتِى دَخَلْتُم بِهِنَّ فَإِن لَّمْ تَكُونُوا۟ دَخَلْتُم بِهِنَّ
فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَٰٓئِلُ أَبْنَآئِكُمُ ٱلَّذِينَ مِنْ أَصْلَٰبِكُمْ وَأَن تَجْمَعُوا۟
بَيْنَ ٱلْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ ۗ إِنَّ ٱللَّهَ كَانَ غَفُورًا رَّحِيمًا ﴿٢٣﴾

❁ وَٱلْمُحْصَنَٰتُ مِنَ ٱلنِّسَآءِ إِلَّا مَا مَلَكَتْ أَيْمَٰنُكُمْ ۖ كِتَٰبَ ٱللَّهِ عَلَيْكُمْ ۚ
وَأُحِلَّ لَكُم مَّا وَرَآءَ ذَٰلِكُمْ أَن تَبْتَغُوا۟ بِأَمْوَٰلِكُم مُّحْصِنِينَ غَيْرَ
مُسَٰفِحِينَ ۚ فَمَا ٱسْتَمْتَعْتُم بِهِۦ مِنْهُنَّ فَـَٔاتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً ۚ وَلَا
جُنَاحَ عَلَيْكُمْ فِيمَا تَرَٰضَيْتُم بِهِۦ مِنۢ بَعْدِ ٱلْفَرِيضَةِ ۚ إِنَّ ٱللَّهَ كَانَ عَلِيمًا
حَكِيمًا ﴿٢٤﴾

"And marry not women
Whom your father married,
Except what is past
It was Shameful and adious,
An abominable custom indeed.
Prohibited to you
For (marriage) are –
Your mothers, daughter,
Sister,father's sister,
Mother's sisters, brother's daughters,
Sister's daughters, foster-mothers

(who gave your suck) foster sister,
Your wives mothers
Your step – daughters under your
Guardianship, born of your wives
To whom ye have gone in, -
No prohibition if ye have not gone in,
(those who have been)
Wives of yours son's proceeding
From your Laws,
And two sisters in wedlock
At one and the same time,
Except for what is past;
For Allah is oft forgiving
Most Merciful; –
Also (prohibited are)
Women already married,
Except those
Whom your right hands possess.
Thus Allah ordained
(Prohibitions) against you
Except for those, all others
Are lawful, provided
Ye seek (them in marriage)
With gifts from your property, –
Desiring chastity, nor fornication.
Give them their dowry
For the enjoyment you have[57]."

Apart from these certain other persons are prohibited due to *musahirat* as Hanafi Scholars say. If a man commits fornication or adultery with a woman, her ascendants and descendents are prohibited to him[58]. Shafeyees maintain that they are not prohibited[59]. If a woman is touched in lust, Hanafis say the ascendants and descendents of that woman are prohibited to him. Here again Shafeyees do not agree with Hanafis[60].

[57] Holy Quran S 4 A 22 – 24 .
[58] Hedaya p. 29
[59] Ibid
[60] *Ibid*

According to Iman Abu Hanifa and some other scholars like Sufyan Sauri, Iman Awzai and Iman Ahmad bin Hambal if a man commits adultery with a woman her mother and her daughter shall,for marriage purposes be forbidden to him and the sanctity of affinity shall be established against the adulterer and the adulteress. According to Imam Shafeyee,however the sanctity of affinity is established only on account of a valid marriage contract and not on account of adultery. There-fore marriage by the said man is not prohibited. But the Ulema of Hanafi School say that the real ground of prohibition is the sexual inter course. If any step has been forwarded in this direction that will occasion prohibition. But Shafeyees say that if Allah(SAW) intended to do so he could have explained it. Even there is no explanation of this kind in Traditions (Hadith). So the view of Abu Hanifa and other Ulema is not preferable over Shafeyee's view who rely upon the Holy Quran . However Imarate Sharia follows the Hanafi view in this regard. Hanafis do not consider the marriage illegal if it is made during *Ehram*, the Great prohibition in *Haj* pilgrimage. But Shafeyees do not allow it .

6. STIPULATIONS:

There may be three kinds of stipulations-[61]

1. Which are necessary after marriage.
2. Which is in against the objective of marriage.
3. Other than the above mentioned heads.

i). HANAFI VIEW:

After marriage the parties get some rights and they are also subjected to certain duties. These are necessary and need not be explained. If

[61] Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp.30-39.*The Muslim Persoal Law Board(MPLB)has decided to discuss this issue in its meeting to be held on 29

there is any stipulations against it, that will not be effective. Where A, a male marries B , a female with the condition that A will neither provide her maintenance nor the residence. As a husband is under duty to provide her the maintenance as well as residence these condition are contrary to the purpose of marriage so these conditions are also void. A, a male enters into marriage contract with B on the condition that B will have the Right not to allow A to go to see C,another wife of A . This is against the purpose of marriage and void. Like this where A agrees with the B not to compel B to begate the children this is also against the purpose of marriage and hence void. Again where A is agreed to divorce C the Ist wife , while enters into IInd marriage contract , this condition is also void under Hanafi Law. However there is difference of opinion whether the carrying the wife from her home to marital home is to be kept in IInd class or in class IIIrd . If it is kept in IInd class this condition will be void. But where it is kept in IIIrd class of stipulations it will be valid. In *Kaukabud durri* it is kept in IInd class. While Allama Aini considers it in class three .Where there is stipulation to dissolve of the marriage after a specific time it is also against the purpose and void . But where there is intention to dissolve the marriage after certain period but not expressed the marriage will be valid.

Hanafis are of the view that even the stipulations which are to be kept in class IIIrd are not enforceable by the courts even then the enforcement of those conditions is morally necessary .

iii). SHAFEYEE VIEW:

Shafyees are having different view regarding IInd class conditions. Where the marriage is on the condition that after consummation there will be

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Oct .2000 ,in Bangalore. It has proposed that the matters of bigamy, triple divorce, delegated divorce etc. will be validly incorporated in *Nikahnama*(The HindustanTimes 14.9.2000 p.1Column 3-5

divorce the marriage will be void. Where one marries for *halala*[62] in that condition also the marriage will be void. Where the condition that after consummation there will be divorce, the stipulation is void and the marriage will be valid. While there intention of divorce after consummation the marriage is valid but abominable.

In the matter of class IIIrd conditions Taqi Usmani in this book *Darse Tirmizi* reports that Shafeyees consider the stipulation of class three as valid and that can be enforced through the courts. But Allama Navavi and Allama Ibne Qudama say that Shefeyees follow the Hanafis view in the matter of stipulation of class three.

iv). HAMBALI VIEW :

Hambalis consider the condition of dissolution of marriage as void. Where there is intention of dissolution that marriage will be void. If the divorced wife wants to marry her former husband who had pronounced the IIIrd divorce cannot marry if she has gone through another marriage on the condition of dissolution.

Where there is condition of class IIIrd that is valid and wife has right to enforce that condition through the court.

v). IMARATE SHARIA'S VIEW:

Imarate Sharia's view is similar to the view of Hanafis.

vi). SUBMISSION:

Here the stipulations of Imam Ahmad bin Hambal seem good. The Hanafis are lenient about dissolution of marriage. It may be due to their strictness in divorce related matters. So the condition of dissolution of marriage is compensated in divorce related matters. However it is submitted

[62] Where there is triple divorce the spouses are not authrised to marry unless the fair sex is married with another person and the marriage is consummated. This is called *halala.*

that there is clear-cut Hadith against *halala*. Although the stipulation to dissolve the marriage is void the dissolution if made for *halala* that (*halala)* will be valid i.e. the cohabitation will validate the re marriage with the man who had pronounced triple divorce to his wife.

CH-4: VIEW OF IMARATE SHARIA ON DOWER AND DIVORCE

1. INTRODUCTION:

Dower is the English translation of the Arabic word *'Mahr'*[1]. Instead of using this term, the Holy Quran has used the words *'Saduqa*[2]; "*Fariza*[3] and *'Ujur*[4] due etc. for the same. The English term is a somewhat misleading as it has narrow and now taken into wider sense[5]. It is the development of evolutionary process of history. This term is development of equal act of bride price and also morning gift in Germany. Any way Dower, the French *douaire* Latin *doarum*, which again is a distorted form

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[1] Which means consideration paid by the husband to the wife

[2] Holy Quran S. 4 A 4.

وَءَاتُواْ ٱلنِّسَآءَ صَدُقَٰتِهِنَّ نِحْلَةً

[3] Holy Quran S, 2 A 236, 237.

لَّا جُنَاحَ عَلَيْكُمْ إِن طَلَّقْتُمُ ٱلنِّسَآءَ مَا لَمْ تَمَسُّوهُنَّ أَوْ تَفْرِضُواْ لَهُنَّ فَرِيضَةً

مِن قَبْلِ أَن تَمَسُّوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ إِلَّآ

[4] Holy Quran S, 5 A 5.

مِنَ ٱلَّذِينَ أُوتُواْ ٱلْكِتَٰبَ مِن قَبْلِكُمْ إِذَآ ءَاتَيْتُمُوهُنَّ أُجُورَهُنَّ

[5] Wilson - Digest on Mohammadan Law 1916, p. 52.

of *dotarum*, is evidently a derivative of dos, a gift. The Lexicon Webster dictionary defines it, 'that part of real estate, of which her husband possessed, at the time of death which is allowed the widow for as long as she lives'.

Tayabji says, that *mahr* is mentioned as being consideration for marriage but probably this is derived from English maxim that marriage is highest consideration. According to Islamic text in Pre-Islamic Arabia women were sold in marriage by their parents or guardians. At that time it was real consideration. But Prophet has prohibited such sales ordering that money should be given to the bride. Odium connected with price or consideration for sale of bride ought not to be attached to dower which not only prevented sale but provided for the woman who had before been treated as chattel[6] Grote,. speaking of pre-historic Greece, says, "we find the wife occupying a station of great dignity of influence, though it was a practice for the husband to purchase her by valuable presents to her parents, a practice extensively prevalent among early communities and treated by Aristotle as an evidence of barbarism."[7]

Amongst Teutonic[8] races *Bitro* that seems to have been equivalent to sale of woman by her guardian payable after marriage to guardian and later on, to girl herself.

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[6] Tayabji - 'Muslim Law' 1968, p, 108.
[7] History of Greece Part - 1 Ch. XX Vol. ii, p. 112. Cited by Tayabji p. 108.
[8] Ibid (Citing Holland, Jurispru.) (7th Ed. p. 257).

2. DOWER AND THE HOLY QURAN:

The Islamic law enjoins that on the occasion of marriage, some amount must be paid by the husband to the wife as dower. The Holy Quran says[9] -

وَءَاتُواْ ٱلنِّسَآءَ صَدُقَـٰتِهِنَّ نِحْلَةً

"And give the woman (on marriage) their dower as gift".

Further[10] -

لَّا جُنَاحَ عَلَيْكُمْ إِن طَلَّقْتُمُ ٱلنِّسَآءَ مَا لَمْ تَمَسُّوهُنَّ أَوْ تَفْرِضُواْ لَهُنَّ فَرِيضَةً وَمَتِّعُوهُنَّ عَلَى ٱلْمُوسِعِ قَدَرُهُۥ

"There is no blame on you
If ye divorce women
Before consummation
'Or the fixation of their dower;
But bestow on them
(A suitable gift)."

Further[11] -

[9] Holy Quran IV - 4.
[10] 'The Holy Quran' S. 2A 236. Mostly Yusuf Ali's traslation is cited so wherever there is no name of the translator it is to be assumed that Abdullah Yusuf Ali's traslation is cited.
[11] Ibid A 237.

وَإِن طَلَّقْتُمُوهُنَّ مِن قَبْلِ أَن تَمَسُّوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ إِلَّآ أَن يَعْفُونَ أَوْ يَعْفُوَاْ

"And if ye divorce them
Before consummation
But after the fixation
Of a dower for them
Then the half of the dower
(Is due to them) unless
They remit it"

Further [12]-

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا يَحِلُّ لَكُمْ أَن تَرِثُواْ ٱلنِّسَآءَ كَرْهًا ۖ وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُواْ بِبَعْضِ مَآ ءَاتَيْتُمُوهُنَّ إِلَّآ أَن يَأْتِينَ بِفَـٰحِشَةٍ مُّبَيِّنَةٍ ۚ

"O ye who believe !
You are forbidden to inherit
Women against their will.
Nor should ye treat them
With harshness that ye may
Take away part of the dower
Ye have given them, except
Where they have been guilty
Of open lewdness;
..."

[12] The Holy Quran' S 4 A 19 & 20.

وَإِنْ أَرَدتُّمُ ٱسْتِبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَءَاتَيْتُمْ إِحْدَىٰهُنَّ قِنطَارًا فَلَا تَأْخُذُوا۟ مِنْهُ شَيْـًٔا

"But if ye decide to take
One wife in place of another,
Even if ye had given the latter
A whole treasure for dower
Take not the least bit of it back".

Further[13] -

إِلَّا مَا مَلَكَتْ أَيْمَـٰنُكُمْ ۖ كِتَـٰبَ ٱللَّهِ عَلَيْكُمْ ۚ وَأُحِلَّ لَكُم مَّا وَرَآءَ ذَٰلِكُمْ أَن تَبْتَغُوا۟ بِأَمْوَٰلِكُم مُّحْصِنِينَ غَيْرَ مُسَـٰفِحِينَ ۚ فَمَا ٱسْتَمْتَعْتُم بِهِۦ مِنْهُنَّ فَـَٔاتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً ۚ وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَٰضَيْتُم بِهِۦ مِنۢ بَعْدِ ٱلْفَرِيضَةِ ۚ

"....Except for these, all others
Are lawful provided
Ye seek (them in marriage)
With gift from, your/ property ,
Desiring chastity, not fornication
Give them their dowry
For the enjoyment you have
Of them as a duty;....."

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[13] Ibid A 24 & 25.

And -

نَعْضُكُم

مِّنۢ بَعْضٍ فَٱنكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ وَءَاتُوهُنَّ أُجُورَهُنَّ بِٱلْمَعْرُوفِ
مُحْصَنَٰتٍ غَيْرَ مُسَٰفِحَٰتٍ وَلَا مُتَّخِذَٰتِ أَخْدَانٍ

"Ye are one from another:
Wed them with the leave
Of their owners, and give them
Their dowers, according to what
Is reasonable: they should be
Chaste, not fornicators, nor taking
Adulterous: when they
Are taken in wedlock,...."
Further[14] -

يَٰٓأَيُّهَا ٱلنَّبِىُّ إِنَّآ أَحْلَلْنَا لَكَ أَزْوَٰجَكَ ٱلَّٰتِىٓ ءَاتَيْتَ أُجُورَهُنَّ

"O Prophet! We have
Made lawful to the
Thy wives to whom thou
Hast paid their dowers".

Thus we see that the Almighty Allah has prescribed the system as gift to wife from husband; though marriage is not consummated and before the fixation of dower marriage is dissolved. It is prohibited to appropriate the dower money by any means except where the women themselves allow.

[14] Yusuf Ali 'The Holy Quran' S. 33 A. 50, also see S. 5 A6, S. 40 A.10 V: 6, LX : 10.

In short the Holy Quran considers the dower as necessary incident of the institution of marriage.

(3) DOWER (HADITH) AND THE TRADITIONS:

Ali S/o Abdullah Quotes[15] from Sufyan (Raz), who heard from Hazira's father saying that he heard from Sahl (Raz) that, "While he was (sitting) among the people in the company of Allah's messenger (SAW) a woman stood up and said, "O Allah's messenger (SAW)! I have given myself in marriage to you; Please give your opinion about me". The Prophet (SAW) did not give her any reply. She again stood up and said, "O Allah's Messenger! I have given myself (in marriage) to you, so please give your opinion about me" (woman). The Prophet (SAW) did not give her any reply, she again stood up for the third time and said, "I have given myself in marriage to you, so give your opinion about me". So a man stood up and said, "O Allah's Messenger! Marry her to me". The Prophet (SAW) asked him," Have you got any thing?" He said, "No". The Prophet (SAW) said, "Go and search for something, even if it were and iron ring". The man went and searched and then returned saying, " I could not find any thing not even an iron ring". Then the Prophet (SAW) said, "Do you know something of the Quran (by heart)?" He replied "I know (by heart) such and such sura." The Prophet (SAW) said, "Go, I have married her to you for what you know the Quran (by heart)[16]. Thus, this Tradition (Hadith) shows that dower is necessary in the marriage. Moreover the fixation of dower is not

[15] Sahih Bukhari Vol. VII P. 59.
[16] Ibid.

necessary that is why the companion (Raz) was asked to bring any thing including iron ring. Thus where the husband has nothing, the intangible thing (of thawab, recitation of verses of the Holy Quran) may be fixed as dower.

4. NATURE OF THE DOWER:

Holy Quran considers the dower as a free gift

'And give the dower to the women with happiness'[17].

Further it is termed as reward in chapter IV verses 25.

The Schools of Muslim jurisprudence consider the dower as essential part of the marriage.

The jurists in India consider it as gift; mark of respect and consideration. In *Abdul Qadir V. Salima*[18] Justice Mehmood held, ' Dower can be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. It is not the exchange or consideration, as understood in the technical sense in the Contract Act given by the man to the woman for entering into the contract but an effect of the contract imposed by the law on the husband as token of respect for the woman. If dower were treated as the bride-price a post-nuptial agreement, to pay dower would be void for want of consideration, but such an agreement is alid and enforceable.

Justice Sulaiman observed, " It is quite obvious that the analogy of sale cannot be carried too far. The marriage can not be regarded as

[17] The Holy Quran S 4 A 4 explained in Tafsir Ibne Kasir Vol. III p. 145.
[18] Badre Alam Khan. " Maintenance of Divorced Muslim Women." Sir Syed Magazine Aligarh, 1996. pp. 12-18.

purely a sale of the person by the wife in consideration for the payment of dower".

But Justice Mitter while reviewing the judgment[19] of justice Mukharji who did not allow the plaintiff Saburunnessa to retain the property given in dower to her by her husband, upheld the judgment and appeal was rejected. The division bench comprising justice Mitter and McNair J. held," It appears from the plaintiff's own statement in the plaint, that her husband made a gift of immovable property in exchange for the dower. The character of such transaction has been regarded as a kind of sale in a decision of that Court which is governed by S. 54, Transfer of property Act and the consideration money being admittedly over one hundred could not be made except by a registered instrument".

It has been contended on behalf of the appellant that a dower is not really a consideration for the marriage and it is in the nature of a gift and therefore the deed did not require registration. It appears clear from the statement which has been quoted that it is not a gift pure and simple, but a hibabelewaz[20] as understood by the Mohammedan Law, It is in reality a sale, and has all the incidents of a contract of sale, the court held.

Justice Mitter further held that the marriage under Mohammedan Law is a Civil contract and is like a contract of sale. Sale is a transaction of property for a price. In the contract of marriage the wife is the property and the dower is the price.

But this decision is only observations as it has no legal sanctity that is why it is neither followed by the courts nor the jurists took this

[19] *Suburunnessa V. Subdu Shaikh* AIR 1934 Cal. 693.
[20] 'Hiba' means gift and 'Ewaz' means consideration.

decision for their comments. Even the Wilson's 'Digest of Mohammadan Law', S. Amir Ali, Prof. Tahir Mehmood etc. do not have reference of this case in their books. Tayyabi has vehemently criticized this observation.

The Patna High Court has held that the dower money is not a charge upon the husband's property. It is an interest restricted in its enjoyment to her personality with in the meaning of section 6(d) of T.P.A[21]. The Allahabad High Court considers the dower as a mark of respect. In *Nasra Begam* V. *Rijwan Ali*[22] it was held that under the Mohammadan Law dower means money or property, which the wife is entitled to receive from the husband in consideration of the marriage. However, the expression, consideration is not to be understood in the sense in which it is used in the Indian Contract Act. In effect dower is an obligation imposed upon the husband as a mark of respect for the wife. Thus the dower is neither the Sale price nor consideration in the commercial sense but is a necessary incident in the form of gift.

5. QUANTUM OF DOWER:

There is no fixed scale of dower in the Holy Quran, which says -

".... Even if you have given her a whole treasure for dower, take not the least bit of it back[23]. Caliph Umar once consulted his consultant's (Shura) and in a general gathering tried to announce the same addressed i.e., not to be considered for preceding as it is contrary to the Muslim law

[21] *Zobair Ahmad V. Jainandan Prasad* AIR 1960, Pat. 147
[22] AIR 1980, All. 119
[23] The Holy Quran S 4 A 20

them and proposed the fixed scale, an old woman stood up and said that how Caliph Umar (Raz) dared to do which is not done by the Prophet. She further told, quoting the ayat 20 of sura 4 that what Allah grants them (i.e. women as dower) they (Caliph Umar Raz. & others) are trying to check. In this way Caliph Umar (Raz) became shy and said, "Every body has better knowledge than Umar even if that is an old and infirm woman."

(1). HANFI VIEW :

As has already been mentioned that no fixation of dower has been made in the Holy Quran and Tradition. However the minimum amount, fixed by Hanafis, is ten *Dirham.* They quote the Tradition where the Prophet of Allah told that there is no marriage except between equals. The woman can not be given in marriage but by guardians, there can not be dower which is less than ten Dirhams[24].

(2). MALIKI VIEW:

Imam Malik is of the view that the lesser amount of dower must not be less than three Dirhams or one-fourth Dinar[25].

(3). SHAFEYEE VIEW:

To Shafeyees the quantum of dower is not fixed. It depends upon the parties concerned. To them any goods capable of being sold may be the dower[26]. The Shawafey quotes the Tradition of the Prophet. Where a person of Banu Fuzara tribe had agreed to marry a woman by giving a pair

[24] Darse Tirmizi, Vol. III, p. 391, but this tradition is weak.
[25] Bidayatul Mujtahid, vol. ii p. 14 cited in Darse Tirmizi Vol. III p. 394
[26] Mughni Vol. VI, p. 680

of shoe to which Prophet (SAW) permitted[27]. So the quantum of dower is not fixed and there is no minimum limit of it.

(4). HAMBALI VIEW:

The Hambalis also have similar view like Shafeyees. But the writer of *Balughul Maran*, Ibnul Hajar Asqalani (Rah) says that Imam Hamabl's view is quite different from Shafeyee's view[28].

In *Haleema V. Moin*[29] it was observed that,"A Mohammadan husband may settle any amount that he likes by way of dower debt upon his wife though it may be beyond his means and though nothing may be left for his heirs after the payment of the amount; but he cannot in any case settle less than ten dirhams."

6. NATURE OF THE DOWER AMOUNT:

The widow's unpaid dower is unsecured debt. She is also to be kept in the list of other unsecured creditors. The right of widow is actionable claim. In *Maina Bibi V. Wasi Ali*, it was held that the woman's right of dower has no priority over other creditors. In *Sayed Ahmad V. Mst. Bunyadi*[30] it was held that dower is a debt within the terms of the succession certificate Act 1889. Where the property is transferred in

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[27] Darse Tirmizi, Vol. III, p. 390. However this tradition is considered as weak but the following two Traditions of the Prophet which are not weak may be quoted here. (i) Abdur Rehman bin Auf (Raz) told the Prophet (SAW) that he had been married Prophet (SAW) asked how much sudaq (dower) he had given. He told a piece of gold equal to the seed of date. (ii) Another Tradition is that when Prophet (SAW) married his daughter to Ali (Raz), he was told not to approach to Fatima (Raz), D/o the Prophet (SAW) unless he gives the dower. He told that he had nothing to give. He was suggested to give his iron chain which is he used in war time. When he gifted the chain, he was allowed to approach. Thus any thing may be fixed as dower.

[28] Darse Tirmizi Vol. III, p. 398

[29] AIR 1971 Pat. 389

[30] (1919) 41 All. 538

consideration of dower, it is not gift but sale[31] that is to be covered by T.P.A[32]. 'It appears to be founded on power of the widow as a creditor for her dower to hold property of her husband of which she has lawfully and without force or fraud obtained possession until her debt is satisfied with the liability to account to those entitled to property subject to claim for profit received[33]. The dower ranks as a debt and the wife is entitled along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully with express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and incomes issues accruing there from, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditors lien under the Muslim law, which has received recognition in the British Indian courts[34]. *Ameer* Ali is of the view that "under Mohammadan law, there is hypothecation without reason, and therefore a widow has no absolute heir over any specific property of her deceased husband so as to enable her to follow it, as in the case of a mortgage, into the hands of a bonafide purchaser for value[35].

The opinion of the courts regarding property in lieu of dower is different. The Allahabad and Andhra Pardesh H.C.s are of the view that it is both transferable and heritable[36].

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[31] *Bibi Janbi V. H. Sahib* (1910) 21 Mad. L.J. 958
[32] *Saburun Nisa V. Sabdu Shaikh* AIR 1934, Cal.
[33] 14 MOO I.A. 377
[34] *Hamaira Bibi V. Zubaida Bibi 43* I.A. 294
[35] Syed Amir Ali "Mohammadan Law", 1976, p. 408
[36] Aqil Ahd's Mohammadan Law, Iqbal Ali Khan ed. (Allahadad: CLA 1999) 19th ed. p. 154

A Muslim widow is entitled to transfer her husband's property of which she is in possession, in lieu of dower, without transferring her dower debt[37]. And thus this will be absolute transfer without any encumbrance. Patna[38] and Bombay[39] H.C.s are of the view that the property is heritable. It is submitted that the views of Alllahabad and Andhhra Pradesh High Courts seems good provided the reasonable time would have passed[39A].

7. DOWER AND THE VIEW OF IMARATE SHARIA :

Dower is a money given to the wife by the husband. It is so important that if it is not fixed at the time of marriage the law will assume its fixation and proper dower will be given to the wife. It is not consideration like in sale of property. Because in marriage nothing is sold or purchased. In Pre-Islamic Arabia, women were sold by their guardians[40]. But Islam has reformed the law and the money is still due on husband but that is to be given to the wife and not to her guardians. That is why the system of *'shighar'* in which the dower is not paid is prohibited[41]. The Holy Quran also specifically makes

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[37] *Abdullah V. Shams ul Haq* and Others A.I.R. 1921, All. p. 262

[38] Patna H.C. is of the view that "when a Muhammadan lady is in possession of her husband's property and she still claims dower debt then her right to retain property exists till dower debt is discharged. Such riht to retain possession can also be exercised by her heirs after her death.

[39] The Bombay H.C. is of the view that where a Mohammadan widow who is in possession of her husband's property, still claims her dower debt her right to retain possession of the property till the dower debt is discharged exists and it is immaterial in what character whether as a creditor for dower debt or otherwise she came into possession of the property, provided possession is lawfully and without force or fraud. Such right to retain possession can also be exercised by her heirs after her death.

[39A] In *Maina Bibi V. Chaudhri Vakil* the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Although there is conflict of opinion, yet in view of the Supreme Court observations in Kapoor Chand case, it seems more probable that this right is not transferable.

[40] B.A.Khan, ' Economic Rights of women under Islamic Law & Hindu Law' (Delhi : Adam Publishers 1999) p. 26

[41] Ibid.

provision for it[42]. In Traditions (*Ahadis*) it has been declared a necessary incident of marriage. Those,who say that it is the sale price of the bride are not having the correct views. Islam never treats the dower as the sale price. Even the Almighty Allah has forbidden using the property of women without their consent[43]. The Tradition where the Prophet (SAW) married a woman to a companion, fixing the verses of Holy Quran as dower is repealed by the verse No. 24 of sura IV where the Almighty Allah has made it mandatory to give the property. The minimum dower is 10 *Dirham*. If less than 10 *Dirham* is fixed as dower it will be increased upto 10 *Dirham*. Where there is no fixation of dower at the time of marriage the proper dower is to be given. Which will be equal to the bride's sister's dower. However due consideration would be given to the beauty in its fixation. So far as the transferability and inheritability of dower is concern, it is very much there.

In *Noor Mohd. V. Amanat Hussain*[44] the Qazi court held that a son has right to inherit the property secured by dower debt of his dead mother from his step- father. Thus where the dower money is not paid by the husband of the deceased wife, her off springs and other heirs have right to take the dower amount from the said husband.

The case of *Mahrun Nisa* V. *Md Akhtar*, *Nasim Haider* V. *Shadabia Jabin*, *Bibi Kariman* V. *Md Mahfooz Ali*, *Mahjabin* V. *Ehsan Ahmad* & *Fahima Khatoon* V. *Nyazul Haque* etc. are also related to the

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[42] Supra Notes 1,2,3 & 4.
[43] Holy Quran IV: 19 & 20 for detail see Supra note 1.
[44] For case Nos. please see the Appendix

dower but the Qazi Court has made the order of payment of dower only. There is no discussion on the topic in the cases mentioned above.

The question arises as to what will happen where the property of deceased husband which is possessed by the widow in lieu of dower. The Imarate Sharia is of the view that she has no right to transfer that property. She will be entitled to that amount which is fixed at the time of marriage[45].

8. SUBMISSION:

Since the amount of dower belongs exclusively to the wife that must be given to her when she demands it. It is immaterial that dower is prompt or deferred. In the Holy Quran there is no mention of deferred dower. On the other hand the commandment of Almighty Allah makes it clear that one is to give the dower with happiness. Again the verse where Allah forbids making excesses against the wife to force her to return the dower amount hints that dower is to be given in the continuance of marriage. The tradition, where the Prophet (SAW) asked Ali (Raz) to pay dower before approaching Fatima(Raz) also corroborates the prompt dower. In short nowhere it has been mentioned that the dower may be paid at the time of dissolution or after death of the husband. Moreover the wife should be given the amount, which is equal to the purchasing value of the dower amount. So there should be consensus of opinion of jurists that the amount is to be assumed in terms of gold at the time of marriage. If it is not done, it may amount injustice to widow/wife.

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[45] *Izzatun Nisa V. Syed Abu Talib* held by Md. Nurul Hasan and Md. Qamruddin JJ (Quzat) of Imarate Sharia

It is submitted that the deferred dower is not proved by the express provisions of Islamic source books. If it is followed in India the amount of dower to be paid at the death of the husband or at divorce/dissolution should be commensurate or at par with the purchasing value of the dower amount at the time when it was fixed i.e. at the time of celebration of marriage. As has been observed some persons deliberately delay the payment of the dower so that the purchasing value of the currency be lessen. But there is problem of interest (*riba*), in revaluating the dower amount in purchasing value and in this way it will not be allowed in Islam. But the *Nazime Sunni Dinyat* of Aligarh Muslim University has suggested a good technique that there should be *ijma* on this point so that the weaker sex may not sustain the loss. Where she keeps any property in her possession in lieu of the dower that must be considered her own property. The right to eliminate and other rights of a full owner should be given to her. It is further submitted that *ijma* may also the made regarding the property possessed by the widow in lieu of dower that only within a reasonable time that property possessed by the widow in lieu of dower that only within a reasonable time that property may be taken back from the widow after the payment of her dower. If it is not done she should be treated absolute owner of that property with full rights of alienation. But right must be proportionate to the dower amount. If she exceeds that should be treated void.

PART-'B'

DIVORCE AND VIEW OF IMARATE SHARIA

1. INTRODUCTION:

Divorce is the translation of Arabic word *Talaq* which means 'to abandon'. In matrimonial matters it means breakage of marital tie.

In the Jewish religion,there was no restriction upon divorce. The husband was permitted to make divorce only in writing but that never came into practice. In the initial stage the husband was free to divorce in whatever manner he wanted but subsequently the Jews put a lot of restrictions over this[46].

In Christianity divorce is not only abominable but also it is treated as a great sin so it is fully prohibited. Only the adulterous woman was to be given the divorce. The Mark[47] contains the wordings of Christ as -"and he saith unto them, whosoever shall put away his wife, and marry another, committeth adultery against her (ii) And if a woman shall put away her husband and she married to another, she committeth adultery."

Luke[48] contains - "who so ever putteth away his wife and marrieth another. committeth adultery : and whosoever marrieth her that is put away from her husband committed the adultery".

Polygamy was also allowed in Christianity. Consequently if there was mismatch in the relation, the life was full of misery and there was no

[46] Fathul Mulhim. vol. I. p. 130. cited by Darse Termizi P.459
[47] Holy Bible 'The New Testament' King James Version - Mark 10 : 11, 12

solution. Later on the Pope allowed the divorce but the grounds were limited. The courts of churches were empowered to grant divorce but, ordinarily; the courts did not grant the same as it was in contravention of the rule of Bible[49].

After the renaissance the restrictions over the divorce was taken away. The duty of the church was limited and the power of divorce was conferred to the ordinary courts. At present both the parties are free to take divorce. Consequently the ratio of divorce in the western countries has increased.

In Hindu religion, divorce was prohibited. The marriage was treated as sacrament once the marital knot was tied it was permanent. Even after the death of the husband the wife was not allowed to marry with others. That is why, the tradition of *sati* started where the widows were forced to burn themselves on the funeral pyre of their husbands. The woman was considered *ardhangini*[50] and marriage was considered the union of flesh to flesh and bone to bone[51]. But when the hardship was realised, the provision for divorce was developed with the help of religious heads. In Northern India, till 1955-60,the system of divorce was considered abominable except in few castes of backward classes[52].

Now in Hinduism, the law is enacted for divorce. The Act of 1955[53] had provided several grounds for divorce and a few others have been added by the amendment in the Act in 1976[54].

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[48] Ibid at Luke 16 : 18
[49] Darse Tirmizi p. 459
[50] Other half of the man
[51] And also soul to soul
[52] Darse Tirmizi p. 461
[53] S.13. Hindu Marriage Act, 1955

2. ISLAM AND DIVORCE :

Islam provides the system of divorce but with great care and caution. The following study will make it clear.

2(1). BETTER TREATMENT WITH WIFE:

Islam dislikes the divorce. So it nips the evil in the buds. So to avoid the evil of divorce, Islam commands to treat the wives in a better way. So it is said that Islamic system of divorce provides a scientific treatment. It is based on Quranic revelations by Almighty Allah. Quran says -

يَـٰٓأَيُّهَـا ٱلَّـذِينَ ءَامَنُـوا۟ لَا يَحِـلُّ لَكُـمْ أَن تَرِثُـوا۟ ٱلنِّسَـآءَ
كَرْهًا ۖ وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا۟ بِبَعْضِ مَآ ءَاتَيْتُمُوهُنَّ إِلَّآ أَن يَأْتِينَ
بِفَـٰحِشَةٍ مُّبَيِّنَةٍ ۚ وَعَاشِرُوهُنَّ بِٱلْمَعْرُوفِ ۚ فَإِن كَرِهْتُمُوهُنَّ فَعَسَىٰٓ
أَن تَكْرَهُوا۟ شَيْـًٔا وَيَجْعَلَ ٱللَّهُ فِيهِ خَيْرًا كَثِيرًا

"O ye who believe[55]
Ye are forbidden to inherit
Women against their will.
Nor should ye treat them
With harshness, that ye may
Live with them.
On a footing of kindness and equity"

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[54] Amendment in Hindu Marriage Act, 1976

Further

فَإِمْسَاكٌۢ بِمَعْرُوفٍ أَوْ تَسْرِيحٌۢ بِإِحْسَـٰنٍ ۗ وَلَا يَحِلُّ لَكُمْ أَن تَأْخُذُوا۟ مِمَّآ ءَاتَيْتُمُوهُنَّ شَيْـًٔا

'....[56]

The parties should either hold
Together on equitable terms
Or separate with kindness

Again -

فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ ۚ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا۟ ۚ وَمَن يَفْعَلْ ذَٰلِكَ فَقَدْ ظَلَمَ نَفْسَهُۥ ۚ

" Either take them back[57]
on equitable terms
or set them free
on equitable terms :
But do not take them back
To injure them (or) to take
Undue advantage,"

Thus the Almighty has commanded such things which would avoid the incident of divorce.

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[55] The Holy Quran S 4 A.19
[56] 4- Ibid. S 2 A. 229
[57] 5- Ibid S 2 A 231

Not only the Holy Quran but the interpretation of the Quran[58] i.e. Traditions says-

1- 'Follow my wordings in relations to the women who are made from crooked rib and if you try to bend it straight, it will break, therefore treat your wives kindly'[59].

2- 'Muavia Qashiri (Raz) says that he asked the Prophet (SAW), " What are the rights of a woman over us, " He replied, "when you bring anything provide them also. When you dress yourself do not forget them. Don't slap them over their face and cheek. Don't abuse them. Don't leave them alone except at your homes'[60].

3- Abu Huraira (Raz) reports the sayings of the Prophet (SAW) that the believer husband will never have hatred with the believing wife....'[61]

4- 'Ayesha (Raz) reports the sayings of the Prophet that amongst believers the best is one who has the good behaviour and is kind over his family'[62].

5- 'Jabir (Raz) reports the sayings of the Prophet (SAW) that his directives about good treatment with wives be followed'[63] and

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[58] Once Ayesha (Raz) was asked about the life of the Prophet (SAW) she replied,' have you not read the Quran "It means what is in the Holy Quran that is explained by the Prophet.

[59] Bukhari. *In Mohd. Ahmad Khan V Shah Bano Begum* the S.C. has cited it negatively. But my humble submission is that it never be treated as negatively. If a person, introducing some persons says - 'These persons are urban persons, if they get angry they will shake the havens; so treat them equitably. It means there is guidance for special treatment. The word 'so treat them equitably, meant condition that where they are not equitably treated. Like this women are not crooked by nature except where they are ill treated.

[60] Masnad Ahmad

[61] Sahih Muslim Sharif

[62] Tirmizi

[63] Shahih Muslim Sharif

6- 'Reports Abu Masood Ansari from the Prophet (SAW) that the expenditure made over the family is a good charity ...'. The best expenditure is that which is made over once own family.'

Thus by good treatment the apprehension of divorce is fully erased.

2.(2). ALTERNATIVE MEASURES TO AVOID DIVORCE :

Where the good treatment is not effective to wipe out the differences between the spouses, the alternative measures are provided instead of divorce. So where there is excess from wife's part, the Almighty Allah commands-

If there is excess from wife's part then Quran says -

وَٱلَّٰتِى تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَٱهْجُرُوهُنَّ فِى ٱلْمَضَاجِعِ وَٱضْرِبُوهُنَّ ۖ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا۟ عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ ٱللَّهَ كَانَ عَلِيًّا كَبِيرًا

"As to those women
on whose part ye fear
Disloyalty and all-conduct
Admonish them (first) ,
(Next), refuse to share their beds,
(And last) beat them (lightly)[64];
but if they return to obedience,
seek not against them

[64] Beating does not mean that woman is made for being beaten like Tulsi's saying '*Dhol Ganwar Shudra Pashu Nari, Ye sab Taran ke Adhikari*' here it means what Luqman the renowned scholar has said that a person's beating to his son is equal to a good charity.

Means of annoyance :
For Allah is Most High
Great (above you all)"[65].

Where the excess is not from wife side the Holy Quran guides-

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ
وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ
اللَّهَ كَانَ عَلِيمًا خَبِيرًا

"If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family.
And another from hers;
If they seek to set things aright,
Allah will cause
Their reconciliation:
For Allah hath full knowledge,
And is acquinted
With all things"[66].

The above discussion shows that the Islamic way of divorce is not instant and must not be a result of provocation. The Islamic concept of carrying of marital knot with happiness is appreciable. But where there is no way of normal relation, then this rule may be considered golden rule. But in fact it is rule of necessity that is why the seeing of the girl with whom marriage is proposed and permitted so that there may not be any

[65] The Holy Quran. S. 4 . A 34

apparent disliking[67]. Where there is any disliking in the wife and the husband is said to think about the virtues of his wife instead of her weaknesses. Allah commands-

وَعَاشِرُوهُنَّ بِٱلْمَعْرُوفِ ۚ فَإِن كَرِهْتُمُوهُنَّ فَعَسَىٰٓ
أَن تَكْرَهُوا۟ شَيْـًٔا وَيَجْعَلَ ٱللَّهُ فِيهِ خَيْرًا كَثِيرًا

"Live with them[68]
On a footing of kindness and equity
If ye take a dislike to them
It may be that ye dislike
A thing and Allah brings about
Through it a great deal of good"[69].

And where the things are intolerable the husband should try to mold her steadily[70].

2(3). DIVORCE IS ABOMINABLE IN ISLAM :

It is reported from the Prophet that the most detestable things, before Allah, amongst all the permitted things is divorce[71]. It is also reported from the Prophet (SAW) that Iblis[72] sits, over his throne and the

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[66] The Holy Quran. S. 4 : A. 35
[67] Although it is not allowed for a righteous to see any woman other than the wife and prohibited degrees women.
[68] i.e.,Wives
[69] Holy Quran S 4 A 19
[70] Holy QuranS 4 A 134
[71] Abu Daud
[72] The head of devil forces whose name is Azazil. In *Fatawaa Rahimia* it is said that (*shaitan*) devil puts his throne on the surface of the sea and then sends his armies to instead people devil applauds such of his soldiers who cause estrangement between husband and wife, embraces them and says : " Bravo! Well done!" Abdur Rahim 'Fatawae Rahimia'. Trans. Murtaza Husain F. Quraishi (Delhi : Kutub Khana Azizia) 1978 II p. 120

agents of devil forces approach with their achievements, who ever amongst them has prevented a student from his studies and one who has created the difference between the spouses; are rewarded by the throne. Such agents become nearer and dearer to the throne.

2(4). PERMISSIBLE NUMBER OF DIVORCE (TALAQUE RAJAYEE) :

In pre-Islamic Arabia the divorce was allowed but no procedure was there. The persons were allowed to make divorce at any time and the number was also not fixed. The taking back was also not restricted. Even after hundred divorce, one was allowed to take his wife back. So the persons were habitual of divorcing their wives.

But after advent of Islam, it is not allowed to divorce the wife more than twice in revocable divorces.

The Holy Quran says -

ٱلطَّلَـٰقُ مَرَّتَانِ

"A divorce is only
Permissible twice"[73].

And if after that there is divorce. The Quran guides -

فَإِن طَلَّقَهَا فَلَا تَحِلُّ لَهُۥ مِنۢ بَعۡدُ حَتَّىٰ تَنكِحَ زَوۡجًا غَيۡرَهُۥۗ

"So if a husband

[73] The Holy Quran S. 2 A. 229. Rahimia it is said that devil (*shaitan*) puts his throne on the surface of the sea and then sends his armies to instead people devil applauds such of his soldiers who cause estrangement between husband and wife, embraces them and says : " Bravo! Well done!" Abdur Rahim 'Fatawae Rahimia'. Trans. Murtaza Husain F. Quraishi (Delhi : Kutub Khana Azizia) 1978 II p. 120

Divorce his wife (irrevocably)
He can not, after that
May Marry her"[74].

In this way Islam puts restrictions[75] in divorce as well as in taking back[76].

3. CLASSIFICATION OF DIVORCE :

There are three situations in which material tie may be broken

(1) BY THE DEATH OF THE PARTIES

(2) BY THE ACT OF THE PARTIES

(3) BY THE JUDICIAL PROCESS (IT HAS BEEN DISCUSSED IN CHAPTERS 5& 6)

(1). BY THE DEATH OF THE PARTIES :

In the life time of the spouses the woman is prohibited to marry with another man and a man is prohibited to marry more than four[77] women. But where the death occurs the woman is allowed to marry with another man after expiry of *iddat*[78].

(2). BY THE ACT OF THE PARTIES :

1. BY HUSBAND

(I). DIVORCE (TALAQ)

i). TALAQUS SUNNAT (AHSAN & HASAN)

ii). TALAQUL BIDDAT

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[74] The Holy Quran S. 2 A. 230.
[75] The Holy Quran S. 2 A. 229
[76] The Holy Quran S. 2 A 230
[77] It is not rule but exception

(II) ILA(IT PROVIDES THE OCCASION TO THE WIFE TO DEMAND DIVORCE)

(III) ZIHAR(IT ALSO PROVIDES THE OCCASION TO THE WIFE TO DEMAND DIVORCE)

(I). DIVORCE (TALAQ):

When the husband divorces his wife, it is called *talaq* or divorce. In sunni law there is no form prescribed for divorce. The husband has full power to divorce his wife either by assigning reasons or without assigning it[79]. In Shia law the form provided by the Prophet is strictly followed. A part from this two Muslim male witnesses are also necessary. The conditional or qualified divorce is permitted in the Hanafi law but not in Shia law[80].

i). *TALAQUS SUNNAT* :

Talaqus sunnat means divorce made in accordance with the Traditions of the Prophet. It is divided in two forms : (i) *Ahsan*, (ii) *Hasan*.

(a) TALAQUL AHSAN:

Talaqul Ahsan[81] defining this divorce, *Hedaya* says[82] that *talaqul ahsan*, or the most laudable divorce is that divorce where the husband repudiates his wife by a single sentence within a *tohr*[83], during which he has not had carnal connection with her and then leaves her to the observance of waiting period (*iddat*) or prescribed term of probation. After

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[78] Normally 4 months and 10 days but it may be after delivery where woman is pregnant which ever is longer.
[79] *Moonshi Bulzar Raheem V. Latifun Nisa* (1861) 8 MIA
[80] Tayabji 'Muslim Law' (1968) VII p.143 to 150.
[81] AIMPLB has proposed some measures to implement itFor detail see supra note chapter 3.
[82] Charles Hamilton 'The Hedya' book IV. Ch,1.
[83] Period from one menstrual course to next course

the expiry of *iddat* the wife will be separated[84]. But the benefit of this divorce is that the parties may marry again.

(b). *TALAQUL HASAN :*

It is also approved form of divorce. Mentioning this the *Hedaya* says that *talake hasan* or laudable divorce, is that where a husband repudiates his wife in three sentences of divorce, in three *tohrs*". Imam Sadi, the teacher of Sarkhusi, has mentioned two kinds of *sunnah* divorce. One is laudable and other is abominable. The laudable is what jurists say *ahsan* and abominable is that to which the jurists say *hasan*[85]. In this way, the traditions, which says the *talaq-e-hasan* as *sunnah* way, is only permissible thing.

ii). *TALAQUL BIDDAT*

A divorce given in contravention of the injunction of the Holy Quran and Prophet's Tradition is known as *talaqul biddat. Hedaya* says "*Talaqul Biddat*, or irregular divorce is that divorce where a husband repudiates his wife by three pronouncements at once, or where he repeats the sentence separately, thrice within one *tohr* [86]," Apart from this the divorce made within the menstrual courses is also considered *bidai* form of divorce.[87] The divorce made within the pregnancy period is also *bidai*[88].

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[83] Period from one menstrual course to next course

[84] As the marriage becomes irrevocable

[85] Darse Termizi Vol.III p. 464

[86] Hemitton Hedaya' p. 73. AIMPLB has proposed some measures to avoid it. For detail see supra note chapter 3.

[87] But where unconsummated marriage is repudiated it is not *bidai*.

[88] Divorce is to be given in the *tuhr* period without having the carnal conjunction. When a woman becomes pregnant, no menstrual course comes, when husband is to divorce after menstrual course it means she is not pregnant other wise menstrual comes could not have come.

Where divorce is made without witnesses, it is also *bidai*[89]. Almighty Allah has revealed-

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا
ذَوَيْ عَدْلٍ مِّنكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَٰلِكُمْ يُوعَظُ بِهِ مَن كَانَ يُؤْمِنُ
بِاللَّهِ وَالْيَوْمِ الْآخِرِ

"Thus when they fulfill
Their terms appointed
Either take them back
On equitable terms
Or part with them
On equitable terms;
And take for witness
Two persons from among you,
Endued with justice,
And establish the evidence
For the sake of Allah .Such
Is the admonition given
To him who believes
In Allah & the last day[90]."

Where the divorce is made in hasan[5A] form[91] it is not good before any of the scholars of different schools Imam Malik considers this form as

[89] But only Shia law recognixes it. The shia law doesnot consider the divorce without witnesses. But in Sunni law divorce is effective without witnesses. No school of Sunni law is exception. Although in surâXV : V.2 it is mentioned, it is interpreted by Sunni's in a different way.

bidai. Thus it is clear that *bidai* form of divorce is not good. But the question is that if it is made what will be the after effect[92].

As we know that Quran says for divorce -

اَلطَّلَـٰقُ مَرَّتَانِ

"A divorce is only
Permissible twice;"

When it will be minutely observed it will be seen that more than ones divorce can not be effective in a single sentence. It must be made one after another. Ibne Taimia says that Allah does not say that two divorce are in two times but in two prescribed times. So where a person says to his wife that he gives her two divorce or ten divorce or thousand divorce that will be considered as one[93]. Hafiz Ibnul Qayyim says that twice means one after another. It never meant the digit two in any language. It is also clear from the verses of the Holy Quran -

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[90] This is not rule for inception of repudiation. It is either for taking back after second divorce or make her away for the marital tie. So it is worth less to say things without witnesses divorce is *bidai* (mariful Quran). I

[5A] Please see Supra note 36.

[91] Only Hanafi scholars consider this form as *Hasan*. (Hedaya)

[92] Even in the bidai form the most controversial question is that where man pronounces triple divorce in one and same setting what will happen or one sentence what will happen.

[93] Fatawa Ibne Taimiyah Vol. III p. 47.

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لِيَسْتَـْٔذِنكُمُ ٱلَّذِينَ مَلَكَتْ أَيْمَـٰنُكُمْ وَٱلَّذِينَ لَمْ
يَبْلُغُوا۟ ٱلْحُلُمَ مِنكُمْ ثَلَـٰثَ مَرَّٰتٍ ۚ مِّن قَبْلِ صَلَوٰةِ ٱلْفَجْرِ وَحِينَ تَضَعُونَ
ثِيَابَكُم مِّنَ ٱلظَّهِيرَةِ وَمِنۢ بَعْدِ صَلَوٰةِ ٱلْعِشَآءِ ۚ

"O ye who believe
Let those whom your right hands
Possess, and the (children) among you
Who have not come of age
Ask your permission (before
They come to your presence)
On three Occasions: before
Morning prayer, the while
Ye doth your clothes
For the noon day heat;
And after the late-night prayer[94]:"

Further -

وَقَضَيْنَآ إِلَىٰ بَنِىٓ إِسْرَٰٓءِيلَ فِى ٱلْكِتَـٰبِ لَتُفْسِدُنَّ فِى ٱلْأَرْضِ
مَرَّتَيْنِ وَلَتَعْلُنَّ عُلُوًّا كَبِيرًا

"And decreed for
The children of Israel
In the book, that twice

[94] The Holy Quran S 27 A 4.

Would they do mischief
On the earth and be elated
With mighty arrogance
(And twice would they be punished[95])!"

The above verses show the number of times where there is mention of twice and thrice. It is also clear that occasions are one after another.

This thing may be more clear from a tradition (Hadith) where it has been told that after *Salat* anyone who recites thirty three times '*Subhanallah*' and in the similar way '*Alhamdo-lillah*' and again '*Allaho-Akbar*' he will be rewarded in such and such way[96]. Where A says *Subhanallah* thirty three *Alhamdolillah* thirty three and *Allaho-Akbar* thirty three it will never be counted as ninety-nine. In the light of above it can be said that so why 'divorce three' or 'divorce irrevocable would not be considered as three divorce.

The opinion that a woman becomes barred after three pronouncement in the single sentence. The question is where a person divorces his wife in separate sentence and three times in the same sitting, would it be considered as one. The answer as Ahle Hadith say is Yes, it would be considered as one, because the second divorce is to be made in

[95] Ibid S 17 A 4.
[96] As Holy Quran says (that unit of ten is complete unit)

the separate action[97]. Moreover the Traditions of the Prophet clearly say that it will be considered as one.

The following traditions may be cited as example. Muslim reports," To me Abdullah S/o Abbas that in the time of the Prophet (SAW) and in the Caliphate of Abu-Baker (Raz) and first two years in the Caliphate of Umar (Raz) the tripple divorce was considered as one time divorce. But Caliph Umar (Raz) said that the persons are making haste in a matter, which need delay. So it will be better to accept their haste[98]."

He further says," To me Taus, to him Sahba's father who asked Abdullah (Raz), the companions of the Prophet (SAW) and son of Abbas whether he knew the fact that in the time of the Prophet and in the Caliphate of Abu Bakar (Raz) and in the 1st three years of Caliphate of Umar (Raz), the tri-ple divorce was considered as one. Abdullah (Raz) affirmatively replied[99]."

Again," To me Taus, to him sahba's father who asked the Abdullah S/o Abbas to teach him the Traditions which were known to him. He asked whether the triple divorce was considered as on in the time of the Prophet and in the Caliphate of Abu Bakr, Abdullah replied affirmatively

[97] Tafsire Khazim; Al Kamal Quran Vol. 1 p. 380, Allama Sudi in Hasma Sunane Nisai Vol. II p. 29; Madakut Tanzeel Vol. II p. 177; Allama Asiruddin Bahri Muheet Vol. II p. 192, Tafseere Kebir Vol. II p. 273, Tafsire Mazhari Vol. 1 p. 235.
[98] Sahih Muslim Vol. 1 p. 477
[99] Ibid

and told that when persons started divorcing the wives in the hasty ways, the Caliph ordered for the effectiveness of the same[100]."

Further," Says Abdullah S/o Abbas that Rukana S/o Abde Yazid divorced his wife by way of triple divorce and fell in sorrow. The Prophet (SAW) asked him how had he divorced his wife. He replied that he divorced her by way of triple divorce. Prophet asked whether in the same gathering. He replied affirmatively then Prophet said that one divorce will be effective and he could take his wife back. So he took his wife back[101]."

Thus the *bidai* way of divorce is considered as wrong and void by the jurists and scholars of the four schools except Imam Shafeyee who considers it as a valid way of divorce[102]. However the effectiveness of three divorces, in one sitting, is recognized by the majority of the jurists, except Ibne Taimiya, Ibnul Qayyim and Ahle Hadith, who say that in such cases only one divorce will be effective[103].

4. IMARATE SHARIA'S VIEW ON DIVORCE :

Imarate Sharia also dislikes divorce. It is the most detestable thing according to Islam. So before divorce the parties were guided to opt the procedure, which would help to resolve the differences between them.

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[100] Ibid
[101] Masnad Ahmad Vol. I p. 265
[102] Darse Tirmizi Vol. III p. 468; Fatawa Rahimia II p. 114

The right of divorce has been given to the husband. Where the husband is a minor, the legal guardian cannot divorce his wife[104]. Where the husband is alleged to have divorced, there is need of witnesses[105]. If divorce is not proved due to lack of witnesses, the husband will be under obligation to disprove the allegation of pronouncing divorce by oath[106]. But in *Zarina Khatoon V. Mohd. Siddique*[107], the Qazi has held that although there was no proof of triple divorce, the lady, who believes that three pronouncements of divorce have been made, she must not marry him after completing the Iddat.[108]. With humble submission it is to say that there is difference between Qazi and Mufti. Before Qazi, if triple divorce is proved in accordance with the Islamic law of evidence, the wife will be prohibited (*mughalliza*) to her husband. Where upto two divorce is proved, she is free to remarry him. In this case the Qazi, despite the decision of two pronouncements had suggested the divorced wife not to marry her divorcing husband, which is against the injunctions of the Holy Quran. In *Saliman V. Shaik Skafat* the Qazi has taken a tough stand. The decision is neither in favour of husband nor wife. In this case *Ms. Saliman* was married with Shaikh Shafat at the age of 7 years. After two months husband went to Orissa and did not return. After a few months she received a letter from an unknown person of Orissa who informed about the death of her husband.

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[103] Ibid p. 470

[104] Fatawa Imarat p.165

[105] *Rasolan V. Abdus Subhan* 30-4271-1384 A H, *Perveen V. Mirza Tahir Beg; Mohd Salim V. Bibi Hasena* 3.19-14170-1412 A H *Surayya Khatoon V. Dr. Mohd Akram*, 145-13642; *Mahrun Nisa V. Akhtar*, 73-13226-1410 A H; *Zarina Khatoon V. Mohd. Siddiqui*, 148-11494-1406 A H, *Mohd. Pervez V. Zubaida*, 297-16427-1417 A H

[106] Ibid

[107] supra Note 2

[108] As iddat was completed & after iddat in marriage may be made between former spouses provided talaque is not pronounced more than two.

After a period of 4 years,she informed certain religious scholars about the death of her husband and wanted to know their opinion about remarrying with another person. She was replied to remarry and she was also given religious decree for remarriage. Her previous marriage was annulled by the decree. She got married with Shaikh Mohsin and a girl child was born to her. In the mean time the former husband returned but did not seek the claim of conjugal rights. Again the former husband disappeared for a period of 16 years. The lady sought *fatwa* of Qazi about the validity of 2nd marriage after the lapse of 16 years.

In this case the Qazi held that the 2nd marriage was legal. Because for death news, report of one person was enough (as per the ruling of *Raddul Mukhar*- Vol. II p.616 and the Holy Quran- Qasas- 22, 25 Nisa- 94) but the marriage became void when the former husband returned to his home. The Qazi gave due importance to the decree of Mufti Kifayatullah but said that the decree is based upon the order of Caliph Umar (Raz) who had taken back his order. Regarding the daughter of the lady, Qazi said that the legitimacy would not be doubted. In this case it has also been held that where difficulty arises, any of the rules of four Sunni schools may be applied. At the last both the marriages were dissolved. 1st one due to absence of husband, while the 2nd due to his appearance. In this case a marriage was considered valid while later on that was treated void. The plea of the parties that Ahle Hadith do consider the 2nd marriage as valid the Qazi observed obiter dicta that they are not amongst the righteous. With humble submission it will be said that the Ahle hadith scholars are also in the list of *ahlul hill wal aqdh* of Imarate Sharia. So the observation is not sustainable and the decision seems erroneous. There was no meaning of

declaration of marriage void as the 2nd husband did not sought conjugal rights. It is amazing that the Qazi rejected the *fatwas* of Caliph Umar and Ahle Hadith Mufti without giving the sufficient reasons. Justice be not only made but it must appear to be done. A woman, married with man after taking proper religious decree is neither given to her ist husband nor to her second husband. Really the decision seems hard and the statement of Qazi is obiter dicta and his own view only.

In the case of *Fatima and Zahra V. Khuda Bakhsh*, the Qazi had accepted the evidence of witnesses who heard the utterances of the defendant but could not see the husband due to barrier of the wall and annulled both the marriages of the defendant. Due to public pressure the defendant accepted that he gave divorce to one of his two wives. Though he did not divorce any one of them. The Qazi observed that confession shows that the husband had divorced which was directly heard by one witness and indirectly by two witnesses.

In this case when there are no proper witnesses , the defendant's confession with regard to divorcing one wife only should have been accepted. In the light of following *fatwa* Qazi would have given the permission to the defendant to keep one wife. *Fatawa Qazi Khan* says:

"And if a man says," My wife is divorced," and he has two wives both being well known, it is competent to him to refer the divorce to which of the two wives he likes.[109]"

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[109] Imam Fakhruddin Hasan Bin Mansoor Al-Uzjandi Al Farghani Fatawa - 1. Qazi Khan Tr & ed. Hon'ble Maulvi Mugammad Yusuf Khan & Maulvi Wilayat Hussain (Delhi : Kitab Bhavan 1986) ii p. 5

In *Shafat* case evidence of one man is accepted but in this case Qazi did not rely upon those sources and one witness was not considered enough to prove the divorce. In *Zahid Ali V. Shamshad Begam* the witnesses gave different statements. Commenting upon this the *Qazi* has held that instead of following Imam Abu Hanifa (Rah), who says that in case of difference in the statements of the witnesses, none will be relied;the view of Imam Abu Yusuf and Imam Mohammad will be followed,who say in case of difference in the statements of the witnesses, the common minimum statement will be accepted and thus two pronouncements were accepted. But again in *Perveen V. Mirza Tahir Baig*, the statement was not unanimous and the common minimum formula was not applied. As in the case above. It is submitted that the Qazi should have followed either Imam Abu Hanifa (Rah) or his disciples as authority, in both the cases. Statements accepted by the pick & choose rule without giving sufficient reason for doing so is not proper.

In *Sibun Nisa V. Mohd Shahadat Husain*[110] it was held that the statement alleging that the defendant has divorced his wife, if not denied is enough to prove the divorce. But *Fatawa Qazi Khan* says-

"A man says to another man," Have you divorced your wife" and the man addressed says," Yes". Spelling the word by its letters the divorce shall be caused[111].

Further," A woman says to her husband," Divorce me" and the husband says," I have done so," the woman shall become divorced[112].

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[110] Supra note 19 & 20. Also see Fatawa Imarte Sharia p. 138
[111] 73 - 9408 - 1399 AH
[112] Fatawa Qazi Khan Vol. II p.3

"And if a woman says to her husband," Give me three divorces," and the husband says," I have done so." Or he says I have divorced three," she shall be thrice divorced. And if in answer his wife, he says," thou art divorced," or he says," thou art divorced," one divorce shall be caused because in this case, the answer does not embody or is not in terms of the question; whereas in previous paragraph or 1st case of the paragraph the answer was in consonance to the question."

Thus for divorce direct affirmative answer is needed like 'Yes' & divorce but not inference. In the case of inference it will be treated as single pronouncement provided the husband says something. Its amazing how saying of others will cause the divorce when there is no delegation of authority. The better way of divorce is *Ahsan*[113] or *hasan*[114]. *Bidai*[115] divorce is not appreciable and rather punishable in Islam. But in most of the cases the *bidai* form of divorces have been recognized by the Imarat Sharia. Even the Qazi himself writes to a single pronouncement as irrevocable. The single pronouncement 'I divorce thee' on 23 of *Shawwal* (one of the Arabic Month) is considered on 20 of the same month as irrevocable. In the decisions of the Qazi no where the system of *bidai* divorce is condemned. Moreover the Traditions of the Prophet to consider triple divorce in one sitting as one, has been ignored. However all over the world there is demand of its reconsideration to treat three divorces as one and that is why the enactment in several countries has been made.

[113] The most loudabla divorce
[114] Loudable divorce
[115] Irregular divorce

A very prevalent way of divorce is coercion. We know that an act done against one's will is not his act. But where one is forced to divorce his wife there is no consideration of coercion. *Fatawa Qazi Khan* reports a Tradition of the Prophet (SAW)-

"Ayesha (Raz) said," I heard the Messenger of Allah says,"There is no divorce, and no emancipation by compulsion."

But Fatawa Imarat says that in coercion the written documents of divorce will not be executed but the pronouncement is to be accepted. But there is need to have a fresh look over it as there is Tradition of the Prophet (SAW) and also need of the hour.

The coercion may be caused in oral divorces so to say that in coercion the written divorces is not divorce and the oral is divorce seems erroneous. However there is proposal in All India Muslim Personal Law Board (AIMPLB) to develop the consensus to consider the divorce under coercion, undue influence, and sleeping etc as ineffective[116].

[116] The Hindustan Times 14.9.2000 Column 3-5p1.the meeting I scheduled to be held on 29 oct. 2000 in Banglore.

CHAPTER - 5
DISSOLUTION

"रहिमन धागा प्रेम का टूटन नाहीं पांय
टूटे सो फिर ना जुड़े, जुड़े गांठ पड़ि जाय"

रहीम

"The mirror of love should be cautiously handled. If it is scratched, the image will not be(fair and clenerbe) fairer and clearer"

CH- 5: DISSOLUTION OF MARRIAGE AND VIEW OF IMARATE SHARIA

1- INTRODUCTION:

Islam has prescribed five things as essential for life and marriage is one of them. It is necessary to get the human desire, fulfilled. Every one whether male or female literate or illiterate, urban or rural, rich or poor, fat or thin, is in need of a life partner to get the sorrow, uneasiness and unpleasant things changed into happiness. It may be said that to get easiness and pleasant it is a must. So Allah has revealed in sura 30 verse 21-

وَمِنْ ءَايَـٰتِهِۦٓ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَٰجًا لِّتَسْكُنُوٓا۟ إِلَيْهَا وَجَعَلَ
بَيْنَكُم مَّوَدَّةً وَرَحْمَةً ۚ إِنَّ فِى ذَٰلِكَ لَـَٔايَـٰتٍ لِّقَوْمٍ يَتَفَكَّرُونَ

"He created for you
Mates from among yourselves
That you may dwell in
Tranquility with them,
And he has put love
And mercy between your (hearts);
Verily in that are signs
For those who know"

Thus, it is clear that the creator, in order to keep the person in tranquility and love, the institution of marriage has introduced. That is why Allah has guided the men in the following verse.

وَعَاشِرُوهُنَّ بِٱلْمَعْرُوفِ ۚ فَإِن كَرِهْتُمُوهُنَّ فَعَسَىٰٓ
أَن تَكْرَهُوا۟ شَيْـًٔا وَيَجْعَلَ ٱللَّهُ فِيهِ خَيْرًا كَثِيرًا

"On the contrary live with them
On a footing of kindness and equality"

Abu Bakar Jasas Razi has, while commenting the above verse, said "Don't talk with them in rough manner, do not ignore them in the home affairs[1]".

Thus talking in good manner, showing the love and affection so that they may feel happy, is necessary, as Allah has revealed in the above-mentioned verse. Allah further guides[2]

أُحِلَّ لَكُمْ لَيْلَةَ ٱلصِّيَامِ ٱلرَّفَثُ إِلَىٰ نِسَآئِكُمْ ۚ هُنَّ لِبَاسٌ لَّكُمْ وَأَنتُمْ
لِبَاسٌ لَّهُنَّ ۗ

"They are your garments
And ye are their garments"

Meaning there by that like garments one is the need of the other at every time and not for temporary period or only sexual passion.

Since man is free in his acts he can do the good work as well as bad work. Some times it happens that a man keeps his life partner in complete misery. She is subjected to the excess of the man. She has nothing to do except tolerating. But some times it becomes intolerable for her. In that extreme circumstances woman has right to get this pious tie broken. If the man is feeling aggrieved he can use the right of

[1] Jasas 'Ahkamul Quran' –Vol . II p. 109
[2] Holy Quran S 2 A 187

divorce and where woman is aggrieved she can get the marriage dissolved. But women are also cautioned in the use of their rights. Prophet (SAW) has said[3] –

"Every woman who ask her husband to divorced her without cause, the smell of paradise is forbidden to her."

But when she is feeling that the continuance of tie will lead her in a life which is unfavourable for her in this world as well as hereafter she can use her right to reach the Qazi to get the marriage dissolved. Before using the right a woman is guided to choose the other solutions. Allah commands[4]-

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ
وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ
اللَّهَ كَانَ عَلِيمًا خَبِيرًا

"If a wife fears
Cruelty or desertion
On her husband's part
There is no blame on them
If they arrange
An amicable settlement
Between themselves;
And such settlement is best"

And further if they are unable to reach on any amicable solution they can appoint the arbitrators.

"If ye fear a breach between them twain,
Appoint (two) arbiters
One from his family,

[3] Fatwa Qazi Khan Vol. I p. 123
[4] Holy Quran S 4 A 35

And one other from hers
If they wish for peace
Allah will cause
There are reconciliation
For Allah hath full knowledge
And is acquainted
With all things".

Not only women but also men are guided to use the right of divorce in extreme circumstances. Prophet (SAW) has said –

"The most detestable among all permitted things in the sight of Allah is divorce"[5]

Dare Qutni reports that Prophet (SAW) has said to Muadh (Raz) –

"Nothing has been created by Allah on the earth which is more detestable than divorce"[6]

But when it is the extreme need and the parties, instead of getting satisfaction from each other passing the life in jealousy and hatred and the family becomes the open scene of the hell. In such circumstances the detestable thing becomes the boon.

The Hanafi jurists describe twelve[7] grounds of dissolution of marital tie i.e.

1) Migration – when a woman comes in Islamic territory after embracing Islam immigrating from non-Muslim state while her husband remains in that state (non-Muslim state).

2) Improper marriage.

3) Marriage in contravention of status (other than Kufw).

4) Dower if not in accordance with status.

5) *Musahirat.*

6) Acceptance of Islam by wife (barring the husband).

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[5] "Ibne Umar says that the thing which is lawful, but disliked by Allah is divorce." Abu Daud Vol. I p. 123

[6] Dare Qutni cited by Abdul Samad Rahmani 'Kitabul Fashkh waltafriq' (Patna: Imarate Sharia, 1400 AH) 2nd ed. p. 35

7) Acceptance of Islam by husband (barring the wife).

8) Fosterage (if the wife has fed her husband during childhood)

9) Option of slavery (*Khayare Ataq*)

10) Option of puberty (*Khayare Balugh*)

11) If one of the parties becomes non-Muslim.

12) Relation of master and slave.

Imarate Sharia follows the Hanafi law. But the rule of (*Talfique & Takhayyur*) picks and choose of any rule of other schools or transformation of Hanafi rule from any other school is applied. For dissolution of marriage it applies the following grounds-

Dissolution on account of-

(1) Untraceability of the husband.

(2) Inability to maintain the wife.

(3) Neglect of the husband.

(4) Impotence of the husband.

(5) Insanity of the husband.

(6) Virulent or Venereal disease of the husband.

(7) Inequality of the husband.

(8) Option of puberty.

(9) Physical contacts (*Hurmate Musaherat*).

(10) Cruelty of the husband and / or enmity between the spouses.

Rahmani 'Tafriq' pp 37-38

2(1). DISSOLUTION ON ACCOUNT OF UNTRACEABILITY:

When the husband's whereabouts[8] have not been known, the wife is entitled to obtain a decree from Qazi for the dissolution of her marriage. After the application of the wife the Qazi shall direct her to wait for a further period of one year. In the event of the husband's whereabouts remaining unknown during that period as well, the Qazi shall pass a decree dissolving the marriage. The wife, then, after observing her *Iddat*, shall be entitled to contract a second marriage.

The directive for waiting for a year shall be given only when necessary maintenance allowance for a year is available for her out of the funds or properties of her husband or that she gets a loan in the name and on behalf of her husband. In the event of the provision for maintenance allowance for that period not being available and there being an apprehension of adultery, the Qazi shall, be empowered to dissolve the marriage forthwith.

The dissolution of marriage, on this ground, shall be deemed to be a revocable divorce.

i). HANAFI VIEW:

There is difference of opinion with respect to the contracting of second marriage by the wife of the person whose whereabouts are not known. According to Imam Abu Hanifa (Rah) the wife of the person cannot be considered to have been released from the marriage-tie till her husband's death is known. In other words, the marriage contract of the wife is not valid as long as other men of the age of the person are alive[9].

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[8] AIMPLB has proposed some measures to implement it by consensus of ulema.The period,however,is further reduced to two years. For detail see supra note 61 chapter 3. Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp.68-79*

[9] Another report providing the basis of the rule of conduct among the Hanafis is that the death of the people of the age (of the husband) is no condition; rather it depends upon the *Ameer*

In some cases, according to later Hanafis the Qazi may permit the wife of the person, to contract marriage with another person. Even before the death of the contemporaries of her husband on the basis of apparent circumstances in which the husband's death may strongly be presumed, e.g. the husband goes on war and later there is no news about his life. In such circumstances, a Qazi, after the lapse of such time in which a strong presumption of his death may be accepted, may give a decree dissolving the marriage. Under such circumstances the husband shall be deemed to be legally dead and the wife, after observing her *Iddat* (of four months and ten days) shall have the right of entering into another marriage.

The view of the Hanafis is opposed to Maliki view, wherein, according to Imam Malik (Rah) the wife of a person whose whereabouts are not known, shall have the right of contracting another marriage after waiting for four years from the time of having recourse to the Qazi and after confirmation of decree of dissolution of marriage from the Qazi on termination of *Iddat*.[10]

ii). MALIKI VIEW :

According to Imam Malik(Rah), there are four kinds of persons of unknown whereabouts, whose whereabouts become unknown [11].

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[10] Ibn Rushd 'Bidayatul Mujtahid', (Cairo 1369 A.H.) Vol. II p. 40

11 The jurists who fixed the period of four years' waiting regarding the wife of the husband whose whereabouts have been unknown base their rule of conduct on the decision of Capliph Umar(Raz) Imam Abu Muhammad Ibn Hazm has reported in his famous book, Al- Muhalla several rulings from Umar(Raz). They aer as follows:-

1. Ibn Abi Layla says that he saw Caliph Umar(Raz) giving the husband, whose whereabouts had becomeunknown and whose wife has contracted another marriage, the right of choice between the wife and the dower that he had given to the wife (i. e. he could take back either the wife or the dower paid to her).
2. Ibn Hazm has, on four other chains of authorities reported the avove mentioned decision of Umar(Raz) as narrated by Ibn Abi Layla. The difference versions are:-

(a) " A husband's whereabouts became unknwon, His wife appeared before Caliph Umar(Raz). He enquired of it from her relatives. They supported her statement. Umar(Raz), therefore, ordered her to wait for four years from the time of the statement made. She (thereafter) entered into another marriage contract. Later, the former husband appeared. He spoke of it (to Caliph Umar(Raz). According to Ibn Abi Layla, "Umar gave him the choice of either taking back the dower or accepting back the wife. He chose to take back the dower (i.e "Umar told the former husband that he could accept back his wife or take back the dower that he had given to the wife). The husband chose to take back the dower.

(b) "Ibn Abi layla said that the wherabouts of a husband became unknown. His wife waited for him for four years. Thereafter, she placed her case before Caliph Umar(Raz). Caliph Umar(Raz) asked her to wait for four years from the time she place her case before him. If her husband did come back so much the better, otherwise, he said she could enter into another marriage contract. The four years (of waiting) passed away. She heard nothing of her husband during that period. She entered into another marriage contract. The former husband, thereafter, appeared. He learnt of it and went before Caliph Umar(Raz). Caliph Umar(Raz) told him, if you want I shall get your wife back to you: or if you wish I may get you contracted into marriage with another woman. The husband replied, you get me contracted into marriage with another woman."

(c) "There is in a narrative a short description of a husband being taken away by some jins (genii). The report then proceeds thus: the wife intimated Umar(Raz) of this. He instructed her to wait for four years. The wife waited for four years. Thereafter she took her case again before Umar(Raz). He, then, passed order to the effect that she might enter into another contract of marriage. The wife got herself contracted into another marriage. The former husband, thereafter, appeared. Umar(Raz) gave him the choice between the wife and the dower. He chooses to take back his wife. The Caliph Umar(Raz) got dissolution effected between the wife and her second husband and made the wife return to her former husband."

Although Ibn Hazm, besides the above, has mentioned other reports from Umar(Raz) but labels them incorrect. It is, therefore , not necessary to state them all.

Of the tradition of Umar(Raz) the opinions of 'Uthman, 'Abdullah Ibn Umar(Raz) and Abdullah b. Abbas. These three of the companions of the Prophet are noted jurists. From amongst the Successors of the Companions of the Prophet(SAW) the names of Hasan al-Basri, Nakhi , Zuhri, Umar b. 'Abdul 'Aziz. Sa'id b. Musayyib, Qatada, Abu-Zanad, Rabi'ah, Awz'I, Layth b. Sa'd and Malik b Anas are concur with the decisions of Umar. Among the Companions, Abdullah Ibn Masud appears to concur with the decision of 'Ali. From amongst the successors of the Companions who concur with 'Ali's decision are sha'bi, Ibn Abi Layla, Shabraumah. Uthman al-Batti, Sufyan Thawri Abu Hanifa, Abu Sulayman and other.

So far as the tradition of the Prophet(SAW) is concerned the jurist, who concur with 'Ali. themselves admit that the same is a weak one. Further, there is difference of opinion on the point whether that tradition can be used validity in support of the assertion of Ali and whether on this basis the assertion of 'Ali can be held to be preferable to that of Umar(Raz). Imam Nawavi writes in his "Sharhtul Muslim" that a weak tradition, though by itself is no proof, it can however, be cited in support of the other traditions (of the Prophet(SAW) or of his Comanians). Ibn Humam in his book, "Fath al-Qadiri" describing the practice of the Hanafis, in adopting the assertion of 'Ali in preference to other assertion, has held that the said tradition is a weak one,

It is said of the ruling of Umar(Raz) that the resiled later from his view regarding the wife whose husband's whereabouts have been unknown and adopted the ruling of 'Ali. But, justic Tanzilur Rehman says inspite of his utmost search, it has not been possible to find any report that would prove that Caliph Umar(Raz) had resilded from his ruling and had recourse to the ruling of 'Ali. Hafiz Ibn Hajar al 'Asqalani, too, has said in his book, *'Al-diryah Fi Takhrij al-Ahadith al-Hidayah* that he has not been able to find any report about Umar(Raz)'s adopting the ruling of Ali:

Ibn Humam names Ibn Abi Layla in connection with Umar(Raz)'s adoption of this ruling, but scholars have not been able to find directly any assertion of Ibn Abi layla in this connection. Even if any such report for Ibn Abi Layla be supposed to exist, merely his assertion is not worth-y of becomming treated as proof.

1. In an Islamic State.

2. In war with infidels.

3. After their going in an infidel country.

4. In war between the Muslim themselves.

Persons whose whereabouts become unknown in an Islamic State the waiting, is four years. Concerning the persons whose whereabouts become unknown in war with infidels there are several views of Maliki jurists, as given below:

1. That he shall be deemed to be a prisoner, till it is not known with certainty that he is dead, his wife shall remain in his marriage.

2. That he shall be considered to have been killed and his wife after waiting for a year may enter into another marriage contract except when she is at such a place where it is easy to get correct information about her husband. It is, then, not necessary for her to wait for a year.

3. That the wife, without waiting for the husband may contract another marriage.

4. That the husband so far as his wife is concerned, be deemed to have been killed.

5. That the husband becomes untraceable after a battle amongst Muslims themselves shall become free from her marriage

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However from the report about the view of the companions stated above, it becomes altogether established that according to Umar(Raz) the wife of the husband whose whereabouts are unknown should place her case before the Authority concerned and thereafter wait for four years. She should then observe her *Iddat* after which she shall become entitled to enter into another marriage. This runs clearly against the assertion of 'Ali which lays down that the wife of the husband whose whereabouts are unknown must wait till the death of her husband or of his pronouncing divorce does become known with certainty. The dictums. in other cases decided by Umar(Raz), based on the fact of return of the first husband as well, disprove Ibn Abi Layla's assertion of Umar(Raz)'s having accepted the ruling of 'Ali.

contract only after observing her *Iddat* without further waiting. According to some others, however, she shall have to wait for a year.[12]

Ibn Rushd is of the view that the reason for fixing the period of waiting for four years is based on the analogy of some opinion that the period of pregnancy, according to Malik(Rah), is four years. But it cannot be correct basis, as the period of waiting; in case of a slave girl's husband's whereabouts being not known is two years. According to Malikis the provision with respect to the period of pregnancy of a free or slave woman is one and the same. Therefore, stricktly speaking, the period of pregnancy cannot be held to be its basis.

Amongst the Malikis, on this question, there are several points of view as to when counting of the period of four years shall begin. According to one statement when the Qazi certifies the missing of the husband, the wife should wait for the period of four years from such date. The marriage, thereafter, shall be deemed as dissolved. The woman shall then observe the *Iddat* for a period of four months and ten days. According to some other Maliki jurists, the period of four years shall be reckoned from the time fixed by the Qazi. According to a majority of them the period expired before the filing to Qazi the application to that effect shall not be counted. According to other view, more preferable is that the counting of the period of whereabouts not being known shall begin from the time that is settled by the Qazi. She shall then have the right of contracting a fresh marriage at her will.

It is said that Imam Malik (Rah) was asked if a wife waited for four years her missing husband but without the decree of a Qazi, whether that period would be relied upon for her eligibility for remarriage. Imam Malik replied, "if she waited (even) for twenty years

[12] Ibn Rushd 'Bidayatul Mujtahid' Vol. II, p. 44.

in that manner. (without the Qazi's decree) it would not be so relied upon; but her waiting for four years from the time she filed her case in the Court of a Qazi would be acceptable[13].

Mawlana Ashraf Ali Thanwi in his book, *Hilatun Najizah*[14], on the basis of the Maliki verdicts (*fatawa*) has ruled that the Qazi shall pass a decree for four years' waiting for the wife, in case she has with her the provision of maintenance (for that period) supplied by her husband. (In other words, if there is no provision for her maintenance she shall not be ordered to wait for a further period of four years). He thus writes, " the direction for the observance of further four years' waiting by the wife (of a person whose whereabouts are unknown) is essential for the one who can pass that period with patience, forbearance and with chastity. In case it is not possible for a woman, due to fear of indulging in adultery, the Qazi has the power of getting the marriage dissolved after waiting for four years.

It is submitted that there should be awareness campaign so that the woman should inform the Qazi about her husband's missing. If she is unable, her case should be considered positively. Marriage is a necessity and if the husband is missing the wife may involve in varieties of immoral acts. So the period of four years should be counted from the date of missing.

iii). MODERN LEGISLATIONS:

The law on this subject in force in various Muslim countries are as follows -

[13] It has been held to the same effect by Ibn 'Abdul Hakam in his "Al-Mukhtasar".
[14] Mawlana Ashraf Ali Thanwi 'Hilatun Najizah', p. 110.

(I). EGYPT :

Section 12[15]. When the husband, without any reasonable cause, is absent for a year or more than a year and the wife inspite of her having the provision for maintenance is put to injury because of her husband's absentee it shall be legal for her to apply to a Qazi demanding irrevocable divorce.

Section 13. When it is possible to have correspondence with the absent husband, the Qazi shall grant time and issue a notice in his name stating that if he does not appear before the Qazi with purpose of living with his wife or taking her wife with him or pronouncing divorce to her, the Qazi shall pass a decree effecting divorce to the wife. When the time expires and the husband takes no action or his objections are not accepted the Qazi shall get dissolution effected between them through an irrevocable divorce. When it is not possible to correspond with the husband, the Qazi shall without giving notice and granting time, pass a decree effecting divorce to the wife.

(II). IRAQ:

Section 43. When the husband, without lawful causes, is absent for two or more than two years and his place of residence is unknown, inspite of the husband's property being in the wife's use, it shall be lawful for the wife to apply to Qazi for dissolution on the ground of injury.

(III). TUNISIA :

When the husband is absent from his wife leaving none of his property with her, making no arrangement for her maintenance and appointing no one to provide her expenses, the Qazi shall order the

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[15] Act No 25 of 1929.

husband to appear before it within a month. In case of his non-appearance, the Qazi, after taking evidence and putting the wife on oath shall pass a decree effecting divorce.

(IV). MOROCCO:

The provisions of law as stated under the Moroccan law on the subject are in accordance with the Egyptian laws under section 12 and 13 stated above.

(V). JORDAN:

The provision of law that enunciated under section 89 and 90 of Jordan's laws are in accordance with Egyptian law under section 12 and 13.

(VI). SYRIA :

Under section 109(1) and (2) of the Syrian law the same laws are enunciated in connection with the right of dissolution on account of husband's absence

There are appreciable differences in the laws in Islamic countries relating to this subject. In Iraq the period of absence of the husband is at least two years, whereas in Egypt, Morocco and Jordan the period of one year is held sufficient for the right of demanding a decree of dissolution.

The second kind of difference, in this connection, is that in Tunisia in the event of the husband's whereabouts becoming unknown the right of demanding dissolution occurs only when the husband neither leaves sufficient property nor makes arrangement for the maintenance of the wife during his absence. Contrary to this, in several other Muslim countries the existence or non-existence of property for

meeting maintenance expenses cannot impede the right of the wife of demanding dissolution.

Under Syrian law it has been made clear that on demand dissolution in the event of husband's absence, such dissolution as shall be effected will be equivalent to revocable divorce; whereas in other Muslim countries such dissolution has been made equivalent to the effecting of an irrevocable divorce.

(VII). INDIAN LAW:

In India under section 2(1) of the Dissolution of Muslim Marriages Act, 1939, says "A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage in the event of her husband's whereabouts being unknown for four years". She has been given the right of demanding dissolution from her husband through the Court. The Court's order has, however, been made to remain suspended for period of six months. If the husband returns during this period of six months and is prepared to fulfill his obligations arising out of the marriage contract, the decree of the Qazi shall not take effect.

According to this clause the period of four years does not commence from the time of the Court's order, but begins from the time when the husband is proved to have disappeared. A wife can file suit under this provision of law at any time after the expiry of four years from the time of the husband's disappearance. Moreover, the Qazi shall not ask her to wait any longer but shall decree her suit if the period of four years is proved. The decree shall be held in abeyance for six months. If the husband returns within the said period of six months, the decree shall be a nullity, provided that he satisfies the Qazi about his readiness to perform his marital obligations.

a). JUDICIAL TREND:

Under Islamic law, there are two kinds of directives with respect to persons whose whereabouts have not been known. The first kind of directives relates to:

(i) The rule of acquiring property from others by missing person

(ii) The rule with respect to the division and distribution of the property among heirs of such person.

The second kind of the directives relate to the right of contracting re-marriage with another person by the wife of the person whose whereabouts are not known. There is difference of opinion with respect to the directive relating to second kind vis. contracting of re-marriage with another person by the wife of the person whose whereabouts are not known. According to Imam Abu Hanifah and Imam Shafeyee, the wife of a person whose whereabouts are not known cannot be considered to have been released from the marriage-tie till her husband's death is known with certainty, or the persons of his age die. Another version as well is found in the rule of conduct of the Hanafis that the death of the people of the age of the missing husband is no condition. In some cases according to Hanafis, the Qazi may permit the wife of a person, even before the death of the persons of the age of her husband on the basis of apparent circumstances in which the husband's death may strongly be presumed. Such as the husband joins a war and there is no trace of him or he goes on a sea voyage and no news of his disembarking is received. In such circumstances, a Qazi, after the lapse of reasonable time in which the strong possibility of his death may be presumed may give a decree dissolving the marriage.

of reasonable time in which the strong possibility of his death may be presumed may give a decree dissolving the marriage.

According to Imam Malik, however, the wife of a person whose when whereabouts are not known shall have the right of contracting another marriage after waiting for four years form the time of her going to Qazi, obtaining decree of dissolution of her marriage and observing her *Iddat*.

In case of *Mozher V. Budh Singh* (I.L.R 7 All 297) it was held that the matter of a missing person pertains to the laws of Evidence and the Muslim Law of Evidence having been superseded, the case of such person shall be governed by the provisions of the Evidence Act. A wife therefore, shall have to wait for 7 years for her missing husband after that he could be presumed to be dead. The period of 7 years commences from the time since when such person has not been heard of (See Sec. 108 Evidence Act, 1872).

But this is not in accordance with the provisions of Muslim law. However, considering the provisions of Muslim law. The Dissolution of Muslim Marriage Act, 1939 has fixed period for 4 years, being in effect, the period of the presumptive death of missing person whose wife may then be entitled to obtain dissolution of her marriage with her missing husband.

iv). ANALYSIS:

The reason under-lying the fixing of two separate periods for presumptive death is that in case of the dissolution of marriage of the wife of a missing husband the purpose is to save the wife from hardship, whereas in case of property the fear of hardship or injury is not so imminent. It may further, be stated that the rule of *Istishab* is available to avert the injury and not to achieve gain. Thus, a missing person shall

be deemed to be alive in respect of his own property till such time that the other persons of his age are expected to be alive. In respect of his inheriting others property, his share shall be set apart as *amanat* till such time the person of his age remain alive.

The law laid down under Section 108 of the Evidence Act, 1872 fixes a period of 7 years for presumptive death without making a distinction between –

(i) the presumption of death for purpose of dissolution of marriage of the wife of a missing person, and

(ii) the right to hold and acquire property of the missing person,

is not in accordance with the accepted view of the schools of Muslim law or the prevalent view in the laws in force in various Muslim countries.

As has been rightly observed by Ibn Rushd, the rule of Maliki *fiqh* is based on the principle of *ijtiha-d.* The period of waiting may be fixed according to the circumstances of each case. In this age means of communication have grown so rapidly and comprehensively as could not be imagined by the people of old time. Today the news of one's disappearance can be spread within one day throughout the country by means of radio, television, newspapers and internet. Even his picture can be published through out the world.

As per one of the Malikis rulings there is no need of 4 years waiting. Under extreme necessity one year waiting will be sufficient. It can be said that this ruling is more appropriate for the modern age and the law regarding the wife of one whose whereabouts become unknown should be based on this particular ruling. Consequently, the law may be as under -

When the wife institutes a suit for dissolution of marriage on the ground of disappearance of her husband for reasons unknown to her and the Qazi after investigation finds that her husband's whereabouts have actually been unknown, it shall order the wife to wait for a further period of one year, If the husband does not turn up during that period of one year the Qazi shall, at the expiry of that period, dissolve the marriage and the wife shall be entitled, after observing her *Iddat*, to enter into another contract of marriage.

Provided, that the Qazi may order the wife to wait for a further period of one year only in case the arrangement of her maintenance for that period has been made by her husband for her and there is no apprehension on her part of her involvement in sexual incontinence and falling in sin. In the event of non-provision of maintenance and the existence of apprehension, as aforesaid, the Qazi may still have the power of dissolving the contract of marriage forthwith, the duration of suit being counted towards the period of waiting of one year.

v). R ETURN OF THE HUSBAND:

A question arises as to what order shall be passed if the husband whose whereabouts have been unknown turns up after four years and after the decree of the Qazi has been passed; and what shall happen if the wife, after observing her *Iddat* contracts marriage with another persons. So far as the first: question is concerned, if the husband returns at a time when the wife is observing her *Iddat* he may have recourse to her as the marriage has not been terminated absolutely.[16] If, however, the wife after observing her *Iddat* has contracted marriage with another person, what shall then happen? According to a report, in

the light of the decision of the Caliph Umar (Raz), if the husband returns before the wife contracts another marriage he shall have her as his wife (whatever time may have passed). If the wife has already contracted her marriage with another person the right of her former husband lapses and he cannot have that woman as his wife, although she may not have had valid retirement with the second husband. The second perfect pact of marriage makes the right of the second husband perfect over her. Imam Malik (Rah) has in his book, *'Muwatta'*, followed the decision of Umar (Raz).[17]

The decision of Caliph Ali (Raz) is at variance with the aforesaid decision of Umar (Raz). According to him the wife, in all events, shall be made to the former husband inspite of her having children from the second husband[18].

The ruling of Caliph Usman (Raz), in this respect, is stated to be that where the wife has contracted her marriage with another person and her former husband thereafter appears he shall be asked whether he wanted the return of his wife or the reimbursement of his paid dower. Action shall be then taken according to his choice. If he wanted the dower back the same will be returned to him.

The wife of a husband whose whereabouts are unknown, inspite of being subjected to extreme misery, must keep on waiting for the rest of her life. It is really hard and difficult for a married woman to keep on waiting for her husband during her entire life. In such circumstance urging unlimited patience is against Allah's commandment,

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[16] Sunanul Kubra: Vol. V, p. 133.
[17] Ibid.
[18] This Tradition is having the weak authorities.

لَا يُكَلِّفُ ٱللَّهُ نَفْسًا إِلَّا
وُسْعَهَا ۚ لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا ٱكْتَسَبَتْ ۗ

"On no soul doth Allah place a burden greater than it can bear." For a wife waiting patiently till receiving the news of her husband's death may become a real cause of her involvement in sexual sin. Hence, the Maliki view, compared to that of Hanafi's and Shafi's appears to be more sound.

The adoption of Maliki view, on this question, by the later Hanafi 'Ulema themselves is also established. The salient points of Maliki doctrine that have been stated in *Hilatun-Najizah* are as follows:

(1) A woman unknown without waiting sufficiently long time applies to Court and the Qazi, after taking evidence in a regular proceeding of the matters of proof of marriage and the husband's missing and after notifying the same through news papers and other sources, arrives at the conclusion that any hope of her husband being found is extinct. It shall then order the wife to wait for a further period of four years. If the husband does not appear even during these four years, the Qazi shall then at the end of that period dissolve the marriage. Such wife, after observing her *Iddat*, shall have the right of entering into another contract of marriage.

(2) However, if the wife after waiting for a sufficiently long period, applies to a Court and the Qazi in view of the real risk of the wife taking to sinful way, takes steps by means of publication etc. for the appearance or attendance of the husband, then it may order that the wife should wait for a further period of one year. On the expiry of that period the Qazi shall dissolve the marriage and the wife after

observing *Iddat* shall have the right of entering into another contract of marriage.

In both circumstances, it is essential that the order for waiting either for four years, or if the wife has waited sufficiently for the return of the husband for a period of one year, be issued. Indeed, according to Malikis, an order may as well be passed by the Qazi that the period of four years or the period of one year be counted from the date of the institution of suit.

vi). IMARATE SHARIA'S VIEW:

Imarat Sharia after brief discussion over Hanafi & Maliki schools concludes that it follows Maliki law in the aforesaid matter.

Imam Abu Hanifa is of the view that the dissolution of marriage, where the defendant is not known, is possible when the other fellows of the area having the similar age group are dead. After the death, the husband will also be presumed to be dead and the religious decree will be issued for the death of the husband. After the waiting period, the wife will be free to marry. For this, *Tahvi* reports that Prophet (SAW) has said.

"This woman is wife of her husband till the fact is clear (of his death)". Ali (Raz) has said that when a woman is subjected to the hardships, she should not have remarried till the appearance of her husband or news of death or divorce from her husband. Because there is evidence of marriage and death is to be presumed. So the marriage will not be dissolved due to assumption of death.

Imam Malik is of the view that a woman whose husband is not known for 4 years has right to get the marriage dissolved. *Jame rumuz* reports-

'The period to wait in the case of husband's disappearance is 4 years as described by Imam Malik and Auzayee (Rah). So after 4 years she will be allowed to marry with another man.'

The 4 years period is subject to the condition where she is getting the maintenance. If not the Qazi can make order of dissolution before expiration of 4 years. Apart from this when there is apprehensions on the part of wife to indulge in the sexual crime the Qazi will grant her the decree of divorce after one year[19], is said that it is better to give the option to the wife. If she wants to remain in the marriage of the husband, she may do and where she wants to be separate she is having the option. This is also corroborated by the tradition where the Prophet (SAW) has said to Barida (Raz) that she was free to choose whether she will be in the marriage or she wants dissolution.

Where the woman is not suffering from maintenance problem and also there is no demand of fulfillment of marital obligations there will be four types of cases.

1. Where the husband has disappeared from the Islamic territory or from the country with which the relations of the nations are good and to make a search of the husband is easy the woman will wait for four years.

2. Where the husband has disappeared from the battlefield, after the possible search the wife will be ordered to wait for one year.

3. When the husband has disappeared in the riots, after the possible search within a few months wife will be ordered to perform *Iddat*.

[19] Allama Mohammad Tayyab Bin Ishaque Ansari Maliki 'Fatwa' cited by Rehmani p. 50

4. When the husband has disappeared from the territory where ordinary human being can't go due to fear of life and there is no possibility of search, there will be no waiting except waiting of death. Any way there are certain conditions before decree of dissolution.

1. She must present the witness for confirmation of marriage

2. She must prove the disappearance of her husband by witnesses.

3. Qazi himself will try to search the disappeared husband.

4. When the Qazi is satisfied he will make an order to wait till 4 years.

5. After 4 years she should obtain the decree of death of disappeared husband.

2(2). DISSOLUTION ON ACCOUNT OF INABILITY OF HUSBAND TO MAINTAIN THE WIFE :

The different schools have the different opinion regarding the husbands inability to maintain the wife. Those who support the dissolution inspire from the verse of the HolyQuran .The *Hadith* of *Dare Qutni* also corroborates the above verse that dissolution will be made. The views of Caliph Umar (Raz), Caliph Ali (Raz), Abu Huraira (Raz), Ibnul Musayyib (Rah) and Caliph Umar bin Abdul Aziz (Rah) are also in consonance with the above views.

The other group relies upon the verse of *Surah Talaq* where Allah has revealed– "**Let the man of means spend according to his means: and the man whose resources are restricted, let him spend**

according to what Allah has given him. Allah puts no burden on any person beyond what he has given him.After a difficulty, Allah will soon grant relief[20]. They quote the above verse in their defense against dissolution of marriage.

i). HANAFI VIEW:

According to Hanafis a Qazi shall not get dissolution effected between the couple merely because of husband's incapability of providing maintenance. The wife shall arrange for maintenance either from her own property or by borrowing in the name of her husband till her husband has easier time.

If the husband is incapable of providing maintenance to his wife no dissolution can be effected between them though the incapacity may arise due to poverty. In support of their contention they rely on the Quranic verse: "Let the man of means spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. After a difficulty, Allah will soon grant relief." [21] The second argument of Hanfis is that amongst the Companions of the Prophet (SAW) there were some who were in

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[20] The Holy Quran S 65 A 7

لِيُنفِقْ ذُو سَعَةٍ مِّن سَعَتِهِۦ ۖ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُۥ فَلْيُنفِقْ مِمَّآ
ءَاتَىٰهُ ٱللَّهُ ۚ لَا يُكَلِّفُ ٱللَّهُ نَفْسًا إِلَّا مَآ ءَاتَىٰهَا ۚ سَيَجْعَلُ ٱللَّهُ بَعْدَ عُسْرٍ يُسْرًا

[21] Holy Quran S 65A7

لِيُنفِقْ ذُو سَعَةٍ مِّن سَعَتِهِۦ ۖ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُۥ فَلْيُنفِقْ مِمَّآ
ءَاتَىٰهُ ٱللَّهُ ۚ لَا يُكَلِّفُ ٱللَّهُ نَفْسًا إِلَّا مَآ ءَاتَىٰهَا ۚ سَيَجْعَلُ ٱللَّهُ بَعْدَ عُسْرٍ يُسْرًا

affluence and some who were in poverty but there is not a single instance during the period of the Prophet (SAW) where dissolution was effected due to poverty or non-providing of maintenance.

Where the husband is unable to maintain the wife, she will not be separated from him on any ground i.e., lodging, fooding or clothing. The Qazi will decide the quantum of maintenance and will make an order that she should take money from any body as a debt saying him that when the husband will be having the means the debt will be returned [22] It is submitted that it may be a good law in the time of Caliphs but it is not possible now a days. Considering the present time situation the later Hanafis were deciding the matters through the Shafeyee Qazi. They also issued the religious decree that where the Qazi is Mujtahid he can dissolve the marriage in the above case. Maulana Abdul Hai in the book '*Umdatur Reaya*' has quoted the saying of Imam Abu Hanifa(Rah) that the Mujtahid Qazi may make the dissolution on the above ground.

ii). MALIKI VIEW:

Sayeed bin Siddique Falati has written that Imam Malik(Rah) was asked that what will happen wheren the husband is unable to maintain his wife. The Imam replied that she will be separated and the marriage will be dissolved. In the corroboration of the above, Falati further quotes that in the city of Medina Umar Bin Abdul Aziz (Rah) was approached in the similar matter. He held that one month and maximum two months time will be given to the husband and if he fails to provide the maintenance, the marriage will be dissolved.

Falati also quotes the religious decree of sayeed Ibnul Musayib (Rah) that there will be dissolution of marriage. However he

accepts that where the woman is provided for that may be an even substandard thing she will not be freed. But where she is denied the marriage she will be dissolved.

The Explanation of Balughul Maram also corroborates this view quoting the practice of Caliph Umar(Raz) and Abu Hurairah(Raz).

iii). SHAFEYEE VIEW:

Nehayatul Muhtaj, [23] a famous book on Shafeyee School, contains that where the husband is unable to maintain, the wife will have right to get the marriage dissolved. Not only this but where the maintenance is being given by the husband's ascendants, the wife is not bound to accept the same. She may approach to the Qazi for dissolution. But for this the institution of Qazi will be via media other wise this ground can't be applied. Only Qazi can make an order of dissolution. The husband will be called and three days will be given to him to provide the maintenance. If he fails to provide within stipulated time she will be separated and the marriage will be dissolved.[24]

iv). HAMBALI VIEW:

The view of Hanbalis is similar to shafeyees and Malikis.

v). COMMENT UPON THE ABOVE VIEWS:

Since Imarate Sharia adopts the rules of *Talfique and Takhyyur*. It has described the view of other schools esp. Maliki School. The views of Imams-Malik, Shafyee and Ahmad b. Hambal (Rah) are that the husband, if he avoids providing maintenance to his wife, dissolution shall be effected between them. Keeping the woman in wedlock amounts cruelty on her in perpetuity. Allah has prohibited

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[22] Samad Rehmani 'Tafrique' P. 56.
[23] Ibid.

retaining them (the wives) for persecuting them.[25] It is cruelty to compel a wife to remain in the wedlock of such a husband and to do away with it is the duty of the Qazi. Hence, when the husband is not agreeable to dissolve the marriage, the Qazi shall be empowered to dissolve the marriage between them.

The view of the Hanafis that the Qazi shall at first order for meeting expenses of wife's maintenance by her borrowing in the name of her husband carries practical difficulties with it. Ordinarily, no permanent provisions for maintenance can be made in such way. Therefore, the duty of the Qazi is to see whether in the near future there is any possibility of the husband acquiring capability of providing maintenance to her. If there is no such possibility and there is an apprehension of the going astray from the right due to husband's poverty, the Qazi will not make any delay in dissolution. The view of Imam Shafeyee (Rah) that dissolution should be effected on the ground of husband's poverty and his non-capacity of providing maintenance to his wife appears to be proper. But in such cases it will be appropriate to give some time to the husband before dissolution.

The grounds given by the Hanafi jurists in support of their view that a marriage cannot be dissolved on the husband's inability or failure to maintain the wife do not appear in the present conditions of the society to take the realities of life into consideration. If a husband fails to support his wife then there seems to be no reason why relief should not be given to her. It is necessary in such a case to adopt the law of another *Sunni School* and to release the wife from hardship by dissolving the marriage tie. It may however be said that a wife who was

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[24] Huququz Zaujan – SAA Maududi –(Delhi: M.M. Islami, 1989) p. 112
[25] The Holy Quran S 2 A 23

not being supported by her husband could, in early period of Islam, receive financial help from the *Baitulmal* or public treasury and so did not experience such hard ships as we see in present times. There is a possibility that wife a deprived of financial support may succumb to immorality rather than face starvation. Wives did generally not face these circumstances in old times.

The Shafeyee, Maliki and Hambali views provide for the dissolution of marriage when the husband is so poor as to be unable to maintain the wife seems proper and practicable. The dissolution effected on the ground of inability to provide maintenance is kept in the category of a revocable divorce. If the husband proves to be capable and prepared to provide maintenance to her, he will have the right to have recourse to his wife, provided her *Iddat* has not expired.

vi).MODERN LEGISLATION:

Laws in connection with effecting dissolution on the ground of non-providing of maintenance to wife have been enacted in several Muslim countries.

(I).IRAQ :

The wife has been given the right of presenting [26]a petition for dissolution to Qazi in the event of husband's not-providing maintenance to her without any legal cause. The Qazi shall order the husband to provide maintenance to his wife within a period of sixty days.

(II). EGYPT:

Under the current Egyptian law, if the husband is unable to provide maintenance to his wife within a period of one month, the Qazi

[26] Under section 45 of the Qantum al-Ahwal al-Shakhsiya of Iraq

shall pass order for dissolution. provided the husband apparently has no property from which the wife may meet her maintenance expenditure. Under Section 91 of *Huququllahul Urduni*, in the event of non-providing maintenance for a year, the Qazi shall pass order for dissolution.

(III). SYRIA:

The[27] wife has been given the right of dissolution in the event of the husband being available and his avoiding to provide maintenance without any cause to her. If, however, he satisfies the Qazi of his inability to do so, the Qazi shall grant him three month's time during which it shall be necessary for him to provide the maintenance. In case of his default, dissolution shall be effected. It has been explained under the said law that such dissolution shall be in the category of a revocable divorce. If the husband is able to arrange for the maintenance during her *Iddat* and provide maintenance to her, he shall have the right of having recourse to his wife.

(IV). SUDAN:

If the[28] husband has no known property out of which a maintenance order can be executed, the wife can demand dissolution of her marriage, which shall be granted forthwith. But if the husband is destitute, the Qazi a period of respite shall first give him. If a husband, who has no known property from which a maintenance order can be executed, goes away leaving his wife without maintenance, she may demand dissolution of her marriage. In such a case, if the husband can be contacted, he shall be asked by the Qazi to arrange for her maintenance within a specified period; if he fails to do so without any

[27] Under section 110. Of the Qanun-al-Ahwal al-Shakhsiyah of Syria
[28] Under Circular No. 17 of 1916, articles 1 to 9 of Sudan

excuse, the Qazi may dissolve the marriage. On the other hand, if he cannot be contacted or has disappeared completely or is of unknown where about (Mafqudul khabar), the marriage may be dissolved without delay. The Qazi's order under these provisions dissolving a marriage shall effect a revocable divorce. The husband can revoke it during the period of *Iddat* if he is prepared to provide maintenance.

(V). MOROCCO:

Under the law of Morocco[29], for want of maintenance it has been provided that the wife may demand from the Qazi, the dissolution of marriage when her husband is present but unable to maintain her. In such cases, where there is no known property and the husband, who is not destitute, persists in not maintaining his wife, dissolution of marriage shall be granted forthwith. If the husband establishes that he is unable to provide maintenance to the wife, the Qazi shall give him a period of respite not exceeding three months, and after the expiry of that period, if the husband still cannot provide maintenance, he shall dissolve the marriage. It has been further provided that dissolution of marriage granted under this article shall constitute a divorce revocable by the husband during the period of *Iddat* if he expresses his willingness for, and is capable of, providing maintenance to the wife.

(VI). IRAN:

The Iranian Law, dealing with the wife's right to maintenance, provides that if an order of the Qazi directing the husband

[29] [Art. 51 (1)].

to provide maintenance to the wife, issued on her application, cannot be executed, she may demand dissolution of marriage by the Qazi.

(VII). INDIA :

A[30] Muslim wife has been given the right of claiming the maintenance, when the husband refuses or neglects to provide maintenance to her for the period of two years. The application of the clause is, however, subject to the general provisions of the Muslim law. Thus, a wife is not entitled to invoke this clause when she herself is at fault. A wife who is *nashizah* or refractory under the Muslim law is not entitled to maintenance and so her marriage cannot be dissolved on the ground that the husband has failed to maintain her for the prescribed period.

Section 2 (ii) of 1939, reads "(the marriage may be dissolved on the ground) that the husband ...[31] has failed to provide for her maintenance for a period of two years;" The Court while explaining the clause held that period of 2 years must be continuous and not in part[32]. When the period is proved the Court will award the decree of divorce[33]. However when she leaves the marital home, she is not entitled to the benefits of the clause.

vii). IMARATE SHARIA'S VIEW:

In *Mst. Zahira Khatoon*[34] *V. Md. Shibli* the plaintiff had mentioned in the plaint that she was given in the marriage of defendant Md. Shibli by her mother's uncle when she was a minor. When she became major, she did not ratify the marriage and hence it should be

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[30] Under Section 2(ii) of the Dissolution of Muslim Marriage Act, 1939
[31] Has neglected
[32] A.I.R. 1946 Sind. p. 48
[33] AIR 1983 Ker 283
[34] 24/8395/1396 AH.

dissolved. She pleaded some other grounds also for the dissolution of marriage. She said that she went two times to the husband's home. There was no any room except a corridor. She was sent to the house of near by inhabitants which she did not like. When she rejected to go, she was beaten and was forced to leave the marital home. Apart from this, she was not provided the food. Some times the father in law was serving her with food and some time he was denying saying that his son was jobless. She was being habitually assaulted in the marital home. So she applied for dissolution of marriage with the defendant.

The Ist witness of the plaintiff said that the defendant had no home and property. He had only one corridor and no room was there in his home. The defendant forced the plaintiff to sleep in the house of near by inhabitants. The food was also not provided to the plaintiff. The householders of her father provided her. She was beaten severely and severally. At last she was forced to leave the home of the defendant. Since that 2 years have passed the defendant has provided no maintenance

The 2nd witness of the plaintiff also said the same thing. He was in relation of both the persons.

On the other hand the defendant denied the charges but accepted that her householders provided the food to the plaintiff. He said further that there was no problem of lodging

The other witnesses said that there was problem of fooding in the house of the defendant but no problem of lodging was there.

The Qazi held that the plaintiff has used the option of puberty after one year of her majority so she had lost the option. Moreover the marriage was consummated so there was no question of option. The

other allegation of the plaintiff was proved by the witnesses. The allegation of fooding problem was accepted by the defendant himself

Thus, the inability of maintenance in which fooding is included was proved. The plaintiff wife was having reasonable cause to get the marriage dissolved. So the marriage of the plaintiff with the defendant was dissolved.

ORDER:

"Due to non maintenance and non fulfillment of marital obligation and non provision of fooding & lodging and to protect the modesty I am dissolving the marriage of Mst Zahera Khatoon plaintiff with Md Shibli, the defendant. The plaintiff is no more wife of the defendant and after waiting period she is free to marry with another person."

2(3). DISSOLUTION ON ACCOUNT OF NEGLECT OF THE HUSBAND TO THE WIFE :

SECTION-A: FROM THE MAINTENANCE POINT OF VIEW:[35]

The next ground of the dissolution of the marriage is denial of maintenance. Allah has revealed "Give the Kinsman (her) due[36]". Further "Men are incharge of women, because Allah has made one of them to excel the other, and because they spend of their property (for the support of women)."

Prophet (SAW) has said –

[35] AIMPLB has proposed some measures to implement it by consensus of ulema.The period,however,is further reduced to one year. For detail see supra note 61 chapter 3. Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp.83-88*

[36] Holy Quran S 18 ^6 26.

"Your wives are having the rights upon you, so provide them lodging and fooding in a better way[37]"

The 2nd Caliph Umar (Raz) when received the complaint about soldiers for non maintenance of their wives he ordered the commanders to tell the soldiers to send the maintenance to their wives.[38]

i). HANAFIS VIEW:

If the husband, inspite of his being in affluent circumstances, avoids providing maintenance to his wife, the Qazi instead of passing an order of dissolution may compel the husband to provide maintenance to the wife by getting the property of the husband sold. If the non-providing maintenance is due to the husband's poverty, the Qazi will pass the order for waiting till improvement in the circumstances of the husband, as God has revealed "After a difficulty Allah will soon grant relief". Therefore, if such a case is brought before a Qazi, he should pass an order that the wife should meet her maintenance expenses by borrowing in the name of her husband. According to some scholars, the wife being an heir to the husband must, when the husband is incapable for providing maintenance, arrange for his maintenance too, provided the wife be capable of it.

ii). MALIKI VIEW :

Allama Sayeed bin Siddique Falati says that the Maliki view upon the denial of maintenance to the wife, despite the means, will lead the marriage dissolved. The Qazi will compel the husband to maintain

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[37] Ahmad Asqalani 'BalughulMaram' (Deoband: Maktaba Thanvi, No Date) p. 333
[38] Ibid p. 335

his wife. For this he will be given 10 days time and if he fails the Qazi will get the marriage dissolved[39].

iii). SHAFEYEE VIEW:

When the wife submits herself to her husband she is entitled to maintenance. In the case of denial she has right to get the marriage dissolved. Her right is absolute when she does not choose to dissolve the marriage, the rights remain effective and she can claim her due when the husband gets the means.

iv). HAMBALI VIEW:

When the wife submits her self to husband, she is entitled to take maintenance and in case of denial she can go to the Qazi to get her marriage dissolve. But the fact that she has submitted herself is to be proved by the wife.

Malikis, Shafeyees and Hambalis are unanimous on the point that if the husband has enough means and does not provide maintenance to the wife and the wife can no longer wait, she has the right of taking her case to the Qazi. The Qazi shall either compel the husband to provide maintenance to the wife or shall dissolve the marriage contract.

The three Imams argue that Allah (SWT) by saying "The parties should either hold together on equitable terms or separate with kindness"[40] has ordered the husbands either to retain their wives on equitable terms (i.e. in proper comfort) or to divorce them with kindness. Hence the husband who has no intention to retain his wife in the proper comfort must put the wife divorcing her.

The rule of conduct of the Hanafis that the Qazi at the first instance ought to pass an order for the provision of maintenance of the

[39] Rehmani 'Tafriq' p. 63

wife by borrowing in the husband's name is beset with several practical difficulties. Ordinarily, borrowing can make no permanent arrangement for maintenance. The primary duty of Qazi, in such cases, is to see whether in near future, there is any possibility of borrowing or of the husband arrangement maintenance or because of poverty there is apprehension of the wife indulging in sin. It shall then in the latter case be incumbent upon the Qazi to get dissolution effected between them.

The point of view of the other three Imams that on the ground of husband's poverty and his incapability of providing maintenance, dissolution ought to be effected seems to be correct indeed it shall be better, in such circumstances, to give at the first: some time to the husband enabling him to make necessary provision for maintenance.

A decree passed on husband's neglect to provide maintenance to his wife shall be in the nature of revocable divorce. If the husband during her *Iddat* applies to the Qazi that he is ready to provide maintenance to his wife he should have the right to have recourse to the wife.

It is submitted that the Hanafi view is not correct and the latter views of the three Imams appears more correct. The proper course shall be that if a husband, inspite of his capability, neglects to provide maintenance to the wife, the Qazi at the Ist instance ought to order him to provide such maintenance. If inspite of this order the husband refuses to provide the maintenance, the Qazi, with the view of removing the harm and injury to the wife, will get dissolution effected between the couple.

vi). MODERN LEGISLATION:

[40] Holy Quran S. 2.A.229

Relevant laws as in force in the above Muslim countries are reproduced as under:-

(I). EGYPT:

Section 4. When the husband refuses to provide his wife with maintenance isnpite of his being possessed of property, order shall be given for providing maintenance to her out of his property. If he is not possessed of property and it is not clear whether he is in poverty or in affluence but he insists on not providing maintenance, the Qazi shall order effecting a divorce. If the husband's inability of providing maintenance is not proved, the Qazi shall dissolve the marriage immediately pronouncing the divorce. If his inability is proved the Qazi shall grant him time not exceeding one month. Inspite of the time granted, if maintenance is not provided the Qazi shall pass decree of dissolution.

Section 6. Dissolution got effected by Qazi on the ground of non-providing of maintenance by the husband shall take effect as a revocable divorce. The husband has the right of having recourse to his wife on his providing, during his wife's observance of her *Iddat* that he is affluent and is prepared to provide maintenance to her. If his being affluent is not proved and his agreeing to provide maintenance is not implemented, having recourse by him to his wife shall not be continued.

(II). SYRIA:

Section 110. (1) The wife has the right of making an application for the demand of dissolution when her husband is present, but his property has not been disclosed and it is not proved that he is incapable of providing maintenance.

(2)If the husband's incapability is proved or he is not traceable the Qazi shall allow him appropriate time not exceeding three

months for providing maintenance. If the husband does not provide maintenance during this period too, the Qazi shall get dissolution effected between the couple.

Section 111. Dissolution got effected by Qazi on the ground of non-providing of maintenance shall be equivalent to a revocable divorce. The husband shall have the right of having recourse to his wife during the observance of her *Iddat*, provided he proves his affluence and shows his readiness to provide maintenance.

(III). JORDAN:

Section 91. When the husband has gone in hiding or has gone somewhere on a journey and remains untraceable for a year and it becomes impossible for the wife to get any maintenance, she may demand dissolution of her marriage and the Qazi, after necessary investigation shall order dissolution of marriage between the spouse.

(IV). INDIA:

In India under section 2(ii) of the Dissolution of Muslim Marriages Act, 1939, the wife, in the event of her husband having refused or neglected to provide maintenance to her for a period of two years the wife has right of demanding dissolution.

a). JUDICIAL TREND:

Non – providing maintenance due to wife's fault .The Lahor High Court in case of *Manak Khan* V. *Mal Khan* (AIR 1941 Lah. 16) has held that provision of Section 2(ii) of the Dissolution of Muslim Marriage Act, 1939 superseded the Islamic law. The same Court in another case *Akbari Begum V. Zaffar Hussain* (AIR 1942 Lah 92) held that under the said section 2(iv) the wife, in the event of the husband fulfilling without reasonable cause the conjugal obligations for a period

of three years, becomes entitled to have her marriage dissolved. Without reasonable cause the conjugal obligations for a period of three years, becomes entitled to have her marriage dissolved. The term without reasonable cause; in connection with maintenance, however do not find place in the said Section 2(ii). Hence it would be taken to mean that inspite the wife herself being held responsible for the non-providing of the maintenance (e.g. due to *nushuz*) she shall have the right to get the marriage dissolved for such non-maintenance. But Justice Lobo of Sind Chief Court, in the case of *Mst. Khadijan V. Abdulcin (All Sindh 65),* differing from the said decision (AIR 1942 p. 92), held that if the husband was not bound under the Islamic laws to provide maintenance to the wife it could not be said that non providing her with maintenance will lead to dissolution. The Allahabad High Court in the case of *Badrunnisa V. Muhammad Yusuf* (AIR 1944 All, 23) followed the said decision of the Sind Chief Court. The same year, however, the Lahor High Court in another case reported in AIR 1944, Lahor, 336 over-ruled the earlier two decisions of its own and held that before establishing the neglect of the husband it ought to be seen whether he was liable under Anglo Mohammadan law, under the circumstances, to provide maintenance. The Court has held that this clause does not caste upon husband an absolute duty to maintain.[41] Although the husband is under legal obligation to maintain his wife regularly. An[42] occasional visit or a half hearted offer of some clothes or some money at long intervals would not amount to maintenance of the wife for the purpose of section 2 (ii).

[41] AIR. 1983 J & K 78
[42] 1985 Ker LJ 27.

In the light of the above decisions the view of the Courts is that refraction (*nushuz*) is a fit ground, not to provide maintenance to the wife. The court of the country should respect the rule by not over riding it. It is therefore submitted that it is a very sound view and should be followed in future decisions.

Nuzhat Jahan V. Tufail Ahmad alias Lalu

The plaintiff said that she was married with the defendant five years before. After 6 months of the marriage the defendant started cruel treatment. Once the sister of the plaintiff reached her marital home. She was (the plaintiff) cruelly treated in her presence, when her sister intervened, the defendant said that unless & until he is provided the cow & bicycle she will remain under cruel treatment. Once the mother of the plaintiff reached the marital home for her *rukhsati* but the defendant refused. When the mother tried to convince the defendant, he became angry and thrown out the belongings of the plaintiff saying that the plaintiff along with the belongings must be departed with plaintiff's mother. Despite the thousands request of the mother of the plaintiff, the defendant did not cool down and finally her mother left the marital home along with the plaintiff. After that, urchins were sent two times to bring her back but she refused. After that, the *panchayat* was held but the defendant refused either to divorce or bring her back. She is denied the maintenance and also denied the marital rights for long time so her marriage be dissolved.

Two witnesses corroborated the sayings of the plaintiff.

On the other hand the defendant said that she was habitual of meeting her sister's husband upon which she was warned. When she was not in the mood to comply she was given some blows. She went to her sister's home without the permission of the defendant. Even she left the

marital home when the mother of the plaintiff had come. When the defendant sent his cousins and uncles, she did not come back, so she was left out but defendant was ready to accept her. However, the dower and the dowry were ready, if she wanted the defendant would hand that over.

The witness of the defendant had denied the allegation made by the plaintiff but they accepted the denial of maintenance and not fulfillment of the marital obligations. It was not possible to carry the life jointly, one of the witnesses of the defendant said.

The Qazi reached upon conclusion that the marriage between the plaintiff and the defendant was held nearly 6 years back. After Six months of the marriage the relations were strained. The plaintiff was habitually beaten, harassed and threatened and she was neglected for 3 years. In this period she was denied the maintenance and the marital rights. So the demand of dissolution was reasonable. The allegations were proved, which are enough for dissolution. So the marriage was dissolved.

ORDER :

"I am pleased to make an order to dissolve the marriage of the plaintiff Nuzhat Jahan with the defendant Tufail Ahamd alias Lalu on the ground of non-maintenance, cruel treatment and non-fulfillments of marital obligations".

Md Serajuddin V. Nikhat Sultanan

This petition was against the judgement of the vice Qazi who had dissolved the marriage of appellant with the defendant.

The petition was filed on 3.3.17. The parties were called on 25.4.17. The defendant represented her by her advocate while the appellant was absent. The parties were again called to be present in the Court of the Qazi on 11.5.17. The appellant was present with his

counsel, a practising advocate while the defendant was represented by her father.

The appellant said that the defendant was not against in the proceeding. It was another lady who was introduced as the defendant. The appellant says that he raised the question of the identification but no attention was paid.

The fact of the previous judgement says that the defendant was present on 5.5.16 and her wordings were recorded. While the appellant was not present despite that he was having the notice of proceedings.

The appellant was given one more chance to disprove the allegations of the wife on 8.6.1416. But the appellant was out of the Court and sent an application. While the defendant who was then plaintiff came with some additional witnesses. Due to the applications of the appellant the date of hearing was fixed on 1.8.1416. On which he came in the last hours. He took the plea of threatening of life and again applied for further time and his sayings were recorded on 22.8.1416.

The appellant has said that he had sent the persons several times for the *rukhsati* of the defendant.

The council of the appellant referring Mullah's book has said that the consent of the husband was necessary. The commentary of justice Hedaytullah was also referred by the counsel that the consent was necessary.

The allegations made by the defendant (plaintiff in the Vice Qazi's Court) were proved by the defendant. Upon whom the Vice Qazi was pleased to pass the order of dissolution of marriage. The appellant has raised the said ground in appeal.

The appellants plea of identity was too late. The fact as per the file of the proceeding the appellant escaped most of the times from the hearing when the hearing was made in his absence who will identify that the defendant was not present in the hearing and the lady present in the hearing was anyone else. The plea of the applicant that he raised the question of identity was not traceable. Since he was not present at the time of hearing how can he raise the objection and question of identity. The later submitted written statement did not contain the plea of identity. Thus the plea at that time was late and not acceptable. Morcover the identity was proved by the witnesses. Thus this ground was rejected.

The 2nd ground of the appellant that he had sent several times for the departure of the defendant was not proved. Amongst two witnesses of the appellant, one said that he had gone to ease the tension between the guardians of the parties. He did not say that he had gone for the departure of the defendant. The another witness also say that the mother of the appellant had gone to the defendant but the witness was unaware with the sayings of the appellant about departure. Thus the 2nd ground of the appeal was also not proved and hence rejected.

The 3rd ground raised by the counsel of the appellant, who was a practicing lawyer, that the consent necessary for dissolution. The fact that the consent is necessary but only in the case of '*Khula*' and the reference, which the advocate had made, was also corroborating about *Khula* and not the dissolution. It is strange that the advocate was not with the Dissolution of Muslim Marriage Act- 1939, in which the consent of the husband is not necessary, provided, the grounds are proved, said the Qazi. Thus the 3rd ground was also not accepted.

Thus the lack of maintenance and non-fulfillment of marital obligations were proved. The appellant had brought no irregularity in the decision of the vice Qazi and hence the appeal was not sustainable. The Qazi was to make following order.

ORDER :

The grounds upon which the vice Qazi had ordered for dissolution could not be vitiated & the grounds stand still good and he was pleased to order to maintain the status quo of the order of the vice Qazi, dismissing the appeal.

SECTION-B: NEGLECT FROM MARITAL OBLIGATION POINT OF VIEW:

There may be a situation that a woman has no problem of fooding lodging, or clothing but she is denied of conjugal rights[43]. In this situation the Holy Quran has given the guidelines for four months.

لِّلَّذِينَ يُؤْلُونَ مِن نِّسَآئِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ ۖ فَإِن فَآءُو فَإِنَّ ٱللَّهَ غَفُورٌ رَّحِيمٌ

"For those who take oath for abstention from their wives. A waiting for four month is ordered; If then they return Allah is oft forgiving Most merciful[44]

Thus the guideline provided to the Qazis and heads (Umara) that the females should not be denied their conjugat rights for more than four months. Although it is for the person who swear not to

[43] AIMPLB has proposed some measures to implement it by consensus of ulema.The period,however,is further reduced to oneyear. Also see supra note 61 chapter 3.

[44] Holy Quran S 2 A 226

approach the wives, but it may be the guiding principles for separating those women who are victim of implied *Ila* i.e.desertion in the case of conjugal rights.

STORY OF CALIPH UMAR(RAZ):

Once a woman came to Caliph Umar(Raz) and said, 'O commander of the believers, my husband is habitual of fasting in the day and prays the whole night. I consider it bad to complain agianst my husband.

Caliph Umar (Raz) replied, 'Your husband is very gentleman.'

Again the woman said the same thing. The Caliph again replied in the same manner. Kab (Raz) who was accompanying the Caliph said, 'O commander of the beleivers, this woman is complaining her husband's non fulfilment of marital obligation'. The Caliph replied. 'If the matter is so, get the matter resolved.'

Kab called the husband of that woman. When he came Kab(Raz) asked the woman to report the matter. She told the following:

"O gentleman Qazi, my partner has been kidnapped from my bed by the mosque. You guide him. The prayers have compelled him not to sleep with me. He is unable to sleep in the day and at night. In the matter of woman's right his action is not praise worthy." Kab asked the alleged husband who replied in this way –

"The Prayers have compelled me to be out of the bed of my wife. Now I am the person who has got addicted due to verses of chapter *Namal* and *Saba Tawal* of the Holy Quran".

After that the decision was also pronounced in the following way.

"O man! verily your wife has got some rights against you. You must pass one night out of four with her. O gentleman! give her the rights due upon you, Be away from pretending.

When Caliph Umar (Raz) heard that one night and a day out of four is ordered by Kab(Raz) he asked the source of this decision. Kab (Raz) replied that Allah has permitted the maximum four wives. If one marries four wives,one will take one day out of four days. So upon this the decision is made.

The Caliph became happy and appreciated the judgment of Kab(Raz). Hc also appointed him thc Qazi of Basra[45]. Thus wherever there is complaint like this, the husband will be forced to fulfill the obligation otherwise, there will be separation between the spouses.

i. HANAFI VIEW:

When the husband neglects performance of conjugal obligations, she will not be having right to go to the Qazi provided the Ist marriage has already been consummated. One who has made the marital intercourse atleast once will not be subjected to the judicial proceedings for the same. *Durre Mukhtar* explains that It is the duty of the husband to make the marital intercourse but no one can compel him to do so. *Tahavi* reports, that a person who has made the Ist intercourse, is liable to make it again but it is only a moral duty and not legal one. If he does't do so he will not be compelled.[46]

Bahru Raiq contains, 'there is consensus that the Ist marital intercourse is obligatory upon the male. If he does not do this he will be compelled by law to do the same but where he is not doing it after Ist intercourse he cannot be compelled.

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[45] Tahavi Vol II p. 98.
[46] Ibid. ——— P —88

It is said that there is a list of U*lema* following the Hanafi school who say that the husband will be compelled to make the marital inter course again & again. To them the marital intercourse is not only a moral obligation but the legal obligation is also there. If the wife is suffering from this problem she may approach to the Qazi and he will compell the husband to make marital intercourse to save the woman from cruelty. Where the husband is not ready the Qazi has the power to dissolve the marriage. Allamam Jassas Razi writes.

'We know that Allah has commanded us to give the rights of those who arc having upon us. In thc matter of the *Ila,* Allah has revealed that retain the women in honour or release them in kindness.[47]" *Shami* also writes

"It is the duty of the Qazi in the matter of the *Zihar* to compell the wearer to expiate or bind him for divorce. The view of the *Ulema* who say that the Qazi will be having the power to compel the person to make the marital intercourse are of later Hanafis". Thus it seems that this matter has not got only the moral force but the legal force also.

ii). MALIKI VIEW:

Malikis[48] are of the view that when there is provision of dissolution in the absence of maintenance, the ground of non fulfillment of marital obligation is more sacred than that. In the case of maintenance other kiths & Kins may provide, while the conjugal obligation fulfilled exclusivcly by thc husband. If there is no maintenance there may be some ailment to the wife. But in case of non-fulfillment of marital obligation there is chance of adultery. So when the

[47] Ahkame Quran – Vol. I . P. 362
[48] Rehamani, ' Tafrique'p. 71

woman want to get her marriage dissolved on this ground, the Qazi after satisfactory proof against the allegation will dissolve the marriage. The Qazi will make haste in dissolving the marital knot where adultery is apprehended on the part of the wife. In the course of the dissolution the wife will get full dower from the husband.

iii). SHAFEYEES & HAMBLI VIEW :

It is said that Shafayee[49] and Hambali views are similar to Malikis view.

iv). IMARATE SAHRIA'S VIEW:

Imarate Sharia follows the Malikis view in this regard.[50] The Shafeyee view is also like Maliki view so it may be said that both schools are followed by Imarate Sharia.

In *Bibi Fatima* V. *Salamath Mian Mansoori*, the plaintiff said that she was married 8 years before with the defendant Salamat Mian Mansoori. After oneyear of marriage the defendant started cruel treatment with her. Not only the defendant was unable to fulfill the marital obligation, she was also beaten, abused, kept hungry and handed over to the nephew of the defendant to entertain her. She was subjected to immoral act by the nephew of the defendant at knifepoint. Although she served the defendant when he was hospitalized at Patna. The defendant had beaten her and thrown her out in the street after return from Patna. So her marriage should be dissolved, as the defendant was unable to fulfill the marital obligations. The witnesses of the plaintiff said that the plaintiff's age was nearly 20 to 22 years and defendant was of 55 to 60 years and he was unable to fulfill his marital obligations.

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[49] Ibid .

One of the witnesses said that once he asked the defendant about his excesses. The defendant resolved not to beat the plaintiff any more. Once the plaintiff was set at the fire but she survived. At last the plaintiff was beaten and was forced to leave the home of the defendant. Before going home, the plaintiff stayed to one of the witnesses, where the brother of the plaintiff came and took her back. After the departure of the plaintiff the defendant did not give the maintenance & the marital obligations were also not fulfilled.

On the other hand the defendant said that he has never ill-treated her. When the thigh of the defendant was broken, the plaintiff served her at Patna. They returned to their home and the defendant again went to the Patna. In his absence, the plaintiff took her ornaments and money and ran away. However, he said that after operation he was unable to fulfill the marital obligations.

The witnesses corroborated the statement of the defendant. Although they say that they have not seen the plaintiff to go out of the house of the defendant with the ornaments and seven thousand rupees. However they agree that the defendant has not given her any maintenance and has failed to fulfill his marital obligations. One of the witnesses said that the continuance of the marriage was not possible as there was hatred.

FINDINGS OF THE QAZI:

After going through the statement of the parties and of the witnesses it was clear that the marriage between the plaintiff and the defendant was held 8 years before. Till seven years of the marriage the plaintiff was residing his marital home but from last 8 months she was

[50] Rahmani, Tafriqu . p.42

residing in her parental home. In this period the defendant had failed to provide her maintenance and fulfill the marital obligations.

The Ist allegation of the beating was proved by the witnesses although they have not seen with their own eyes but one of the witnesses said that once he warned the defendant and the defended took oath not to commit that sin again. One of the witnesses of the defendant also was said the possibility of the defendant to beat the plaintiff.

The 2nd allegation of the plaintiff was not proved that she was kept hunger.

Thus the Qazi Court had held that point of the plaintiff was that the nephew of the defendant had tried to have illicit relations with the plaintiff and several times he compelled the plaintiff to have illicit relations. The witnesses of the plaintiff said that the fact was known to the entire village.

The 4th point of the plaintiff was not proved that the plaintiff was set at fire.

The 5th point of the plaintiff that the defendant has no capacity to fulfill the marital obligations is proved as the defendant has accepted this point saying that after operation, the defendant was too weak to have the marital intercourse.

The sixth point of the plaintiff that she was compelled to leave the house of the defendant was also proved. The plaintiff's witnesses have seen by their eyes for one day the plaintiff stayed in the house of the one of the witnesses. On the other hand the witnesses do not corroborate the plea of the defendant that the plaintiff has left the house of the defendant with ornaments and rupees. The witnesses said the hearsay story.

Thus the plaintiff had enough ground to get the marriage dissolved as she was subjected to immoral act and more over there was problems of the non fulfillment of the marital obligations. Keeping in the view of the above things the marriage of the plaintiff was dissolved by the Qazi.

Order

"I am pleased to pass the order of dissolution of marriage of the Plaintiff Bibi Fatima with the defendant Salamat Ali Mansoori due to non fulfillment of the marital obligations The plaintiff is no more wife of the defendant. After *iddat* period she is free to marry".

4. DISSOLUTION ON ACCOUNT OF BEING IMPOTENCE OF THE HUSBAND:[51]

The case of impotence may arise when the husband has no male organ or that may be a non-entity or he is unable to perform marital intercourse.

I.EUNUCH:

Eunuch means a castrated male employed in a harem[52]or the person who does not have penis or whose penis is almost a non-entity. To be a eunuch of the husband is also a ground of dissolution of marriage.

Where the wife wants to get her marriage dissolved on this ground, the Qazi after due inquiry and evidence may dissolve her marriage. Qazi Khan has also given a religious decree (*fatwa*) for the dissolution[53]. *Hedaya* says that the Qazi should dissolve the marriage

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[51] Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp.53-59*
[52] Lexicon Webster Dictionary
[53] Rehamani p. 73

without delay[54]. But the Qazi will see whether she has consented to the marriage despite the knowledge or she has accepted her husband when she came to know after the marriage. If she has done so she would not be allowed to get the marriage dissolved on this ground[55]

II. IMPOTENCE :

Impotent means the man who, inspite of having his male organ, is not capable of having sexual intercourse with his wife. A person may be impotent by birth or on account of some disease, weakness, old age or other reasons. The man, who is capable of having sexual intercourse with some women and is not capable of having it with some other women, shall be considered to be impotent in respect of those women with whom he is not capable of having sexual intercourse. The man who suffers from emission before contact with the woman, he too shall be considered to be impotent.[56]

It is also ground of dissolution of marriage as has been told in the matter of impotence. a person does not have the capability of marital intercourse. So the Qazi after due enquiry will assign her the right to opt either her husband or dissolution[57] *Hedaya* also advocates for her right of dissolution[58].

If the man is not capable of having sexual intercourse, his wife has been given under law the right of demanding dissolution through Qazi. This right of the wife does not lapse even with the passage of time.[59]

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[54] Ibid
[55] Ibid citing Durre Mukhatar
[56] Fatawa 'Alamgiri, Vol. II, p. 155
[57] Fatwa Qazi Khan cited by Rehmani 'Tafriq ' p. 73.
[58] Hedaya cited by Rehmani 'Tafriq p. 73.
[59] Raddul Mukhtar Vol II p. 612

When the wife takes her case before a Qazi it is incumbent upon the Qazi to find out the truth from the husband. If the husband admits that he is not capable of having sexual intercourse with the wife the Qazi shall grant him a year's time for treatment.

If the husband claims of his having sexual intercourse with the wife and the wife does not claim to be virgin the husband shall be made to take oath to support his claim. If he does take oath that he has had sexual intercourse with the wife, the Qazi shall reject the petition of the wife. If he refuses to take such oath the Qazi shall grant the above-mentioned time to him for treatment.

If the wife claims that she is still a virgin the Qazi shall order her to be examined. If the wife, on examination, is not found to be virgin the husband shall be made as above to take oath. If he takes oath that he has had sexual intercourse with the wife, the Qazi shall not pass an order for dissolution. If the husband refuses to take oath the Qazi shall grant him time.

In case the wife pleads about her being not a virgin and that her husband has spoiled her virginity by his fingers or by some other method and not by having sexual intercourse with her and the husband maintains that he has had sexual intercourse with her[60], according to Hanafis the result of the examination of the wife as to how her virginity came to be spoiled shall be relied upon. Preferably the number of examining persons should be two.[61]

The time of one year shall be counted from the day the Qazi grants it. Prior to it whatever the time lapses it shall not be taken into account.[62]

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[60] Ibid. p. 613

[61] 'Abdur Rahman Al-Jazari: Kitab al-Fiqh 'alal Madhahib al-arba'ah, cited by Rehmani 'Tafriq ' p. 73.

[62] Al-Sarakhsi: Al-Mabsut, Cairo, 1324 A.H., Vol. V, p. 102.

If the husband, on treatment, gets well within one year and succeeds in having sexual intercourse with the wife even once, the right of the wife to the dissolution of marriage on this ground will lapse.

If the husband does not succeed in having sexual intercourse with the wife even once within the given period of one year the Qazi, on the desire of the wife, shall direct the husband to pronounce divorce to the wife. Upon his refusal, the Qazi himself shall effect dissolution.[63]

III.INDIAN LEGISLATION:

The wife has been authorised by virtue of section 2 (V) of the Dissolution of Muslim Marriages Act, 1939 to demand dissolution on the ground of her husband being impotent and the Court, on the application of the husband, is bound to grant him time for the period of one year.

Granting one year's time to an impotent husband is a settled rule of Sharia. The current law by the addition of the words, 'On the application of the husband', has been brought closer to the real spirit of the law.

The time that is allowed to the husband for the cure of his impotence is one year. It cannot be less or more than that period of time. It is stated in *Hedayah* that the year of probation fixed by the Qazi in the case of impotence is to be counted by the lunar calendar, whereas *Fatawa Alamgiri* recommends the use of solar year by way of precaution, which is usually followed now.

IV.JUDICIAL TREND:

[63] Hedaya Vol. II p 421

A marriage was annulled on the ground of impotence although, the evidence showed that it was restricted to the wife and was not a general condition of the husband[64].

A husband was held by the Madras High Court under the Indian Christian Marriage Act to be impotent when intimacy with the wife was not possible on account of the abnormal size of the male organ as a result of which ordinary and complete intercourse was physically impossible. It was held that the husband was impotent as far as the wife was concerned. The view was based on the reasoning that impotence includes impracticability of coition[65]

Under Muslim law, the husband's impotence has to be proved as a fact. But under certain conditions Courts draw a legal presumption that the husband is impotent. Thus if the husband and the wife have lived together for a long time in the same house under conditions when the sexual intimacy was possible and it be established that the wife is still a virgin, though a fit subject for sexual intimacy, the Court may presume that the husband is incapable for coition at least with regard to the wife.[66]

If the Court is satisfied that marriage has not been consummated although no impediment to consummation be apparent. The Court will be justified in dissolving the marriage[67].

The decision of a case involving impotence becomes difficult when it is contested and a spouse denies the allegation made by the

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[64] G. V. M. (1885) 10 App. Cas. 171.

65*KanthyBalavendram V. Harry*, A.I.R. 1954, Mad. 316

[66] *Ibrahim V. Altagen* A.I.R. 1925, All 24; *Altafan V Ibrahim* A.I.R. 1924 All. 116

67. *Ranga Swami V. Arravind Ammal* A.I.R. 1937, Mad 237

68 *Brinda Kumar Viswa V. Hemlata* Biswa, I.L.R. 48 Cal. 280:

other. In such a case medical examination of the spouse becomes very important. A Court has got full power to order the examination of the spouse or of one of them. In case of refusal to allow such examination, by any one the Court will be perfectly justified in drawing an inference against the party refusing the medical examination. The Courts in India have wide discretion in ordering medical examination of the parties subject to such conditions as may be necessary in a particular case. On the refusal of a party to attend for medical examination, the Court may draw an unfavourable inference against the party guilty of refusal[68].

A doctor's certificate to prove the capacity or incapacity of the other must be strictly proved by examining doctor, who issued it so that it may satisfactorily be ascertained as to what test he has carried out and how has he arrived at his conclusion[69]. It may however, be stated that opinions of doctors are relevant but not conclusive. When the experts differ, the value and sufficiency of their value may legitimately form the subject of consideration and scrutiny despite their acceptance by one Court or another[70]

Ordinarily, the Court is to pass an order, if the husband so wished, giving one year's time to him for treatment, and adjourn the cases for one year. If on the expiry of one year the disease is found not curable the Court will pass a decree dissolving the marriage.

Allahabad High Court in the case of *Mohd. Ibrahim V. Altafan*[71], observed that the decree passed in the first instance is not to be executed. It is a conditional decree, which becomes operative only on the failure of the prescribed conditions. It does not change the status of

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[69] *Conselves V. Iswariah,* A.I.R. 1953, Mad. 858
[70] *Altafan V. Ibrahim.* AIR 1924, All, 116
[67] Ibid
[71] Ibid

parties who continue to be liable for the maintenance of the wife while a spouse can on the death of the other, inherit from the deceased.

Muslim jurist do not recognise a waiver by the husband, that is time shall be given to him even when he does not want it or refuses to have it. The Lahore High Court has, however, held in a case that the condition as to adjournment is imposed for the benefit of the husband and if he does not want to avail himself of it he can certainly waive the right and in such a case the condition of suspension of the Court's order will not be necessary and the marriage shall be dissolved forthwith[72]. The principle of law laid down in this ruling is against the rule of Muslim Law mentioned above, but it appears to be more in accord with justice, equity and good conscience. It would be hard on the wife to make her wait for one year when the husband, for whose advantage the period of one year is granted, does not want it. If he considers that a grant of time is not necessary there is no reason why he should not waive this right. This difficulty is not experienced in India as time is granted to a husband under the provisions of the dissolution of Muslim Marriage Act, 1939, only when he applies for it.

V.IMARATE SHARIA'S VIEW :

Impoten-t is the person, who, despite having the penis, unable to make intercourse. It may be of two kind.

1. General Impotence

2. Particular Impotence

In general Impotence, a person is unable to intercourse while in particular impotence a person is capable of intercourse with one wife and at the same time unable to intercourse

[72] Badruddin V. Mst. Allah Bakhi, A.I.R. 1937, Lah. 383

with another. *Hedaya* says that where a husband is impotent, the Qazi is to appoint the term of four year from the period of litigation, within which if the accused have made intercourse with his wife it is well otherwise the Qazi will pronounce a separation provided the wife so desires. Referring Caliph Umar, Caliph Ali and Abu Masood (Raz) *Hedaya* says that wife has right of casual enjoyment.[73] The Imarat published book on dissolution contains the following points.[74]

1. The woman should file the case before Qazi.

2. The Qazi should enquire it with the alleged husband. If he accepts then the Qazi will provide him a term of one year.

3. Where the husband denies the allegation -

i. He will have a swear provided the wife is not virgin.

ii. In case the husband is not ready to say on oath, he will be given a term of one year for medication.

iii. If the wife claims her virginity the Qazi will ask two expert women to check her. If the report of women is contrary to her claim, the husband will have to say on oath that he has done the intercourse and his statement will be considered as true. Where the husband does not say on oath, he will be given a term of one year for treatment.

4. The term will be counted for the date of order of the Qazi.

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[73] Ibid

5. If the husband is capable of intercourse in the provided term, the wife will not have the right to be separated.

6. Where the husband is unable to make intercourse in the said term, the wife will be given the option either to remain in his marriage or to choose separation.

7. Where the wife fails to choose separation in the same sitting, she will not have option to the separated in future. But Imarate Sharia has eased the condition of dissolution on this ground. Mr. Abdus Samad Rahmani, the former deputy *Ameer* of Imarate Sharia has written that Maliki view may be applied in this regard.[75] In this regard the writer has quoted Ibne Wahban (Rah)[76], *Tahqul Anwar*,[77], *Quhastam*[78], *Hasbul Muftin*[79] Caliph Umar (Raz) and *Shami* [80]etc. and established that where there is need the view of other Schools may be applied. In *Khairun Nisa V. Asghar Ali,* the acceptance of alleged impotence led the marriage dissolved although husband wanted last chance.[81]

In Khairun Nisa V. Asghar Ali [82] the plaintiff said that she was married with the defendant and went her marital home. But the husband was found impotent. When this matter was reported to the guardians, the arbiters were appointed. In the mean time the plaintiff returned to her parental home. The arbiters decided for *rukhsati* of the

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[74] Rehmani 'Tafiq' pp. 74-75
[75] Maulana Abdus Samad Rehmani 'Quza ke Chand Aham Masayal Fatva'. Imarate Sharia Iind ed. 19 pp. 34-37.
[76] Ibid 32
[77] Ibid 33
[78] Ibid 34
[79] Ibid 35
[80] Ibid
[81] 156-14007-1412 AH. For details please see appendix.
[82] Case No. 156-14007-1412 AH

In Khairun Nisa V. Asghar Ali [82] the plaintiff said that she was married with the defendant and went her marital home. But the husband was found impotent. When this matter was reported to the guardians, the arbiters were appointed. In the mean time the plaintiff returned to her parental home. The arbiters decided for *rukhsati* of the plaintiff and she went two times to her marital home but no improvement was found in the husband.

The defendant husband on the other hand, accepted his impotence but requested once more for *rukhsati.*

Keeping in the view to the above things the Qazi did not accept the request of defendant. The Qazi held that the defendant was allowed by the arbiters to have the *rukhsati* of the plaintiff and despite his medication no improvement was made. So that request would have made the matter more complicated. The right of the marital intercourse is a basic right of the wife and she was denied of this right. Thus her request of dissolution was reasonable. Finally her marriage was dissolved.

[82] Case No. 156-14007-1412 AH

CAPTER - 6

DISSOLUTION CONTD.

مرغک بیضا بروں آید و روزی طلبد　　آدمی زادہ ندارد خبر و عقل و تمیز

آنکہ ناگاہ کس کشت بہ چیزے نارسید　　و ایں بتمکین بفضیلت بگذشت از ہمہ چیز

آنگینہ ہمہ جا یابی ازاں بے محل است　　لعل و شوار بدست آید ازاں است عزیز

از گلستاں سعدی

"Hens face no problems how to bring up their babies. But children take a long time to understand the things. If any thing is found without endeavour nothing is achieved. The thing which is found after struggle is an achievement. To obtain the led is not difficult that is why it is lying everywhere. But to obtain Lal (a special diamond) is difficult so it is important"

CH-6: DISSOLUTION AND IMARATE SHARIA(CONTD.)

5. DISSOLUTION ON ACCOUNT OF INSANITY OF THE HUSBAND:

Insanity is another ground of dissolution of marriage[1].

1). JURIST'S VIEWS:

According to Imam Muhammad (Rah), a wife is entitled to demand dissolution of her marriage provided the madness of the husband is of such a degree that her living with him be impossible. However according to Imam Abu Hanifa (Rah) and Imam Abu Yusuf (Rah) the wife is not entitled to demand dissolution from her husband on this ground. According to the three Imams. Viz. Imam Malik (Rah), Shafeyee(Rah) and Ahmad b. Hambal(Rah) the wife, in the event of her husband being mad, is entitled to demand dissolution.

In case of continuous madness of the husband the Qazi ought to pass a decree for dissolution without giving any time to the husband. In case of periodic madness, time for a year may be given, as is mentioned in some books of *fiqh*[2]. The difference between continuous and periodic madness can only be said that the madness which is temporary and

[1] AIMPLB has proposed some measures to implement it by consensus of *Ulema*. Also see supra note 61 chapter 3. Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza op.cit. pp.80-82*

[2] Rahmani ' Tafriq' p. 80

recovery occurs at intervals is a periodic madness. As against the continuous madness is that,which remains constant without any recovery.

The wife has been empowered to demand dissolution under Section 2(vi) of the Dissolution of Muslim Marriages Act, 1939, in cases where the husband suffers from madness for two years. There is no mention of time for treatment being granted to the husband nor any discrimination or distinction has been maintained in the suits regarding continuous and periodic madness. A study of the books of *fiqh* shows that in case of discontinuous madness, the jurists are in favour of granting one year's time to the husband for treatment[3]. It shall thus be advisable that the minimum period of madness in the above law instead of two years be reduced to one year, and it should also be provided that one-year time be granted for treatment, in case of discontinuous madness.

In this connection it is necessary to differentiate here that the impotence of the husband becomes the basis of the right of demanding dissolution by the wife only when the defect be in the husband at the time of the marriage contract. If the husband becomes impotent afterwards, the wife has no right to demand dissolution[4]. There is no such restriction in case of madness. Whenever the madness appears and it persists for more than the prescribed period the wife has the right of demanding dissolution.

2). PAYMENT OF DOWER & OBSERVANCE OF IDDAT:

If the dissolution of marriage is brought about before valid retirement[5] the dower due on the husband shall lapse and in the circumstance, the observance of the *Iddat* shall not be necessary in the same way as in case of dissolution before consummation of marriage. If

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[3] Ibid p. 82
[4] Rehman p. 584.
[5] Fatwa Alamgiri, Vol. II p 133.

the knowledge of madness is acquired after valid retirement and the dissolution of marriages brought thereafter, full dower shall become due on the husband and the observance of *Iddat* shall also become incumbent upon the wife.[6] There is no necessity to dissolve a marriage in every case merely on the presence of one of lunatic grounds[7]. But if the madness takes such a shape as to influence the attitude of wife toward the husband to such an extent as to think it dangerous and impossible for her to live in peace with him the marriage will be dissolved on this account.

3). IMARATE SHARIA'S VIEW:

As per Imarate Sharia a wife is entitled to get her marriage dissolved on the ground of insanity. However, the opinions of Imam Abu Hanifa (Rah) and Imam Abu Yusuf (Rah) are different.[8] According to Imam Mohammad (Rah) she is entitled to an option in order that she may remove an evil from herself. In similar circumstances the husband has power to divorce. The argument of both the scholars (Abu Hanifa & Yusuf) (Rah) is that in marriage no such type of right exists. If this is allowed, it would operate to the destruction of the husband's right who is still capable of intercourse and to continue the generation.[9] Imam Mohammad's (Rah) view is prevalent and accepted by Hanafi scholars. He says that diseases like leprosy and white spot are grounds of dissolution due to natural hatred and insanity should be treated at par. The views of *Shaikhain* are not sustainable, as it will be creating great problems. And in this way those are to be treated as an impediment in taking once right. Sexual passion is not the only thing to be obtained by

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[6] Rehman p. 583
[7] Hedayap128
[8] Hedaya p. 128
[9] Ibid

the husband but procreation of children and life partnership is also important things to which she would be denied. If in case of impotence or person without penis, she would have right to opt either her husband or dissolution why not she has option here?[10] Imarate Sharia has issued the following guidelines for its implementation[11].

1. Wife has to prove the complete insanity on the part of husband.
2. After due investigation and inquiries the Qazi should give one-year time for medication.
3. After one year, if wife demands the dissolution due to his insanity, which could not be cured, the Qazi will provide her the opportunity to opt.
4. If wife opts dissolution the Qazi will dissolve the marriage
5. The dissolution will be caused due to marriage being void, in this case.

The dissolution is to be made on fulfillment of following conditions also:

1- Wife must not have known the insanity before marriage.
2- She must not have accepted him when she came to know about his insanity.
3- After knowing the insanity she must not have allowed him to have intercourse.
4- She must opt the dissolution immediately and before standing up from her seat when Qazi provides her the opportunity and not after wards.

Imarate Sharia further explains that where the insanity is occasional the above rule will be applied. But in case of permanent

[10] Rehmani 'Tafriq' pp 79-81
[11] Ibid pp. 82 - 83

insanity the Qazi will make dissolution of the marriage without seeking the wife's option.[12]

The above-mentioned rules were not followed in case No 10 of 1494 AH[13]. However it seems from the above para that the rules are favourable to the husband.

In *Anjum Ara V. Mohd. Haider Ali*[14] the plaintiff said that defendant, her husband, had turned mad. He was unable to provide her the marital right. She was also denied the maintenance from the defendant side so her marriage should be dissolved.

The Qazi heard the parties. The father of the defendant accepted the madness of the defendant. The defendant was unable to say any thing due to his mental disorder.

Keeping in view the prayer of the petitioner and acceptance of the defendant side, the Qazi dissolved the marriage without assigning any time to the defendant for medication.

In *Rabeya Khatoon V. Mohd Tasleem* [15]the plaintiff said that she was married three years before the petition of dissolution. For one year she went usually to her marital home despite the excesses of the defendant. After one year the defendant turned mad and had gone anywhere. In that period he neither maintained her nor provided the marital rights. So her marriage should be dissolved.

The notices were issued and were published in the newspaper fixing the time for hearing and judgment. But the defendant did not turn.

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[12] Ibid
[12] See Appendix A
[13] See Appendix A
[14]Case No. 392-16075-1416 AH
[15] Case No. 229-15612-1416 AH

The allegations of the plaintiff that she was unable to have her rights and madness of the defendant were proved. The Qazi, considering the prayer of the plaintiff dissolved her marriage.

In *Shah Jahan Begum V. Mohd. Murtaza*[16] the plaintiff said that she was married 8 years before filing the petition for dissolution with defendant. She begot two children in which one male child was alive. After two years of marriage the defendant turned mad. She lived with him for two years but there was maintenance problem. So she came her parental home. The defendant came twice for *rukhsati* but the plaintiff told him to come with his father. In the mean time the defendant in the madness killed his brother and was arrested by the police. There was no body to pursue his case. So her marriage should be dissolved with the defendant.

The witnesses proved the allegations of the plaintiff. The father of the defendant himself accepted the madness of the defendant. The plaintiff was deprived of all types of rights for the last four years. Under these circumstances the Qazi considered the prayer of the plaintiff reasonable and ordered for the dissolution of the marriage.

6. DISSOLUTION ON ACCOUNT OF VIRULENT OR VENEREAL DISEASE:

The virulent or venereal diseases are also the ground of dissolution of marriage[17].

1).HANAFI VIEW:

[16] Case No. 150-15834-1416 AH

[17] AIMPLB has proposed some measures to implement it by consensus of *Ulema*.. Also see see supra note 61 chapter 3.

The Hanafis say that if the wife finds in her husband such a physical defect or disease that prevents him form having sexual intercourse with her she shall be entitled to get the marriage dissolved. Such diseases are also contagious and they affect the health of the wife also.

According to the majority of the Hanafis, if the wife finds that her husband suffers from a venereal disease that hinders him in having sexual intercourse with her, she is entitled to seek dissolution from him through the Qazi.

Imam Muhammad (Rah) has added leprosy and leucocythaemia in the list of virulent diseases.[18] Imam Kasani quoting the ruling of Imam Muhammad has, therefore, written that his being free of each of such defects i.e. leprosy and leucocythaemia is an essential condition of the marriage contract, otherwise the marriage contract on that ground shall stand vitiated.[19]

It is said that according to *Shaykhayn* i.e. Imam Abu Hanifah and Imam Abu Yusuf(Rah), the wife is not entitled to obtain decree of dissolution on the ground of her husband suffering from leprosy or leucocythaemia.[20] However, *Quhistani* is quoted as reporting from Imam Muhammad(Rah) that the wife has an option (of getting a dissolution) in the case of leprosy of her husband. She has also an option on account of every such defect, which makes her union with the husband, without receiving harm or injury to her, impossible.[21]

The basis of difference between Imam Abu Hanifah(Rah) and Imam Abu Yusuf(Rah) on one side and Imam Muhammad(Rah), on the

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[18] *Bahur Raiq*, Vol,III, p. 137
[19] Al-Kasani : Vol. II, p. 327.
[20] Damad Afandi, vol. I, p. 463:
[21] Al-Muhit, Vol. II p 133

other is that the formers are convinced of the option of dissolution only in such a venereal disease that hinders one in having sexual intercourse. According to formers, the wife on the ground of the defects such as leucocythaemia cannot be entitled to secure dissolution. The reason being that these defects or diseases are not basic impediments to sexual intercourse. The Prophet(SAW) has said, 'You marry each other and procreate children'. The main purpose of marriage contract obviously is to procreate children and satisfy the carnal appetite. Hence if the sexual intercourse is not possible the purpose fails and if the wife demands dissolution it becomes incumbent upon the husband to grant her divorce. If the husband refuses to effect divorce, the wife under the *Shariah* is entitled to get the marriage dissolved through the Qazi.

2). MALIKI VIEW:

According to Maliki school, as against the Hanafi view, each of the married woman is entitled to get the marriage dissolved due to diseases and physical defects discussed above.[22]

Imam Malik (Rah) is convinced of the optional right of dissolution of each of the married women because of defects viz. Leprosy, leucocythaemia. Ibn Rushd in his book, *Bidayatul Mujtahid* writes that Malikis have differed about the rationale on account of which they have limited the right of dissolution to only these defects.[23] According to them, limiting the defects to only four types of diseases is in effect a directive based on no particular cause (*illat*). In other words, those who are convinced of the right of repudiating the marriage contract on account of only those defects and are opposed to the right of dissolution on any other ground, consider the same to be based on the revealed guidance. Whereas

[22] Rehmani 'Tafrijq' p. 85.
[23] Ibid.

the others advance arguments limiting the defects to the number because they consider that these defects are inconspicuous while other defects are visible. No right of dissolution can accrue, in their view, on the ground of visible defects. According to some, the defects that are hereditary are to be held to give good ground for dissolution[24].

3). SHAFEYEE VIEW:

Dissolution may be made on account of leprosy and leucocythaemia. According to Shaykh Muhammad al-Sharbini al-Khatib, the author of *Mughni al-Muhtaj,* the learned men and experienced physicians are of the view that leprosy and leucocythaemia are largely infectious and are impediments for sexual intercourse. No sensible person shall be inclined to have sexual intercourse with one who suffers from these diseases.[25]

It is said[26] that in the event of leucocythaemia, leprosy being found in any one of the married husband the wife will have the right of annulling her marriage.

4). HAMBALI VIEW:

Ibn Qudamah al-Maqdisi[27] in his noted work (on Hambli *fiqh*) *Al-Mughni* and Abdullah Ibn Miftah[28] in his book, *Almunzi al-Mukhtar* too have described such diseases and have spoken of the wife's right of dissolution.

Maqdisi has written that dissolution of the marriage contract has been restricted to these defects because they stand in the way of achieving the purpose of marriage. Leprosy and leucocythaemia are extremely

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[24] Rehman p. 505
[25] Mughni al-Muhtaj, Vol. III, p. 203.
[26] Ibid. P. 585.
[27] Ibn Qudamah, al-Maqdisi: Al.-Mughni, Vol. VII, p. 597.
[28] 'Abdullah b. Miftah, Shaykh Al-Munzi al-Mukhtar, vol. ii, p. 295.

obnoxious. They appear injurious to the wife's mind. Amputation prevents sexual intercourse while hydrosile diminishes pleasure from it.[29]

The following points are in favour of dissolution of marriage with the person suffering from virulent and venereal disease.

1. One of the principles of the law of *shariah* is To give or suffer no harm. Hence the husband's retaining the wife, inspite of his having no power to give the wife her lawful rights (sexual intercourse), tantamount to inflicting injury on her. The Sharia is for the purpose of fully realising human potential. Hence, the attainment of the wife's happiness demands that she, in such circumstances, be given the right of dissolution.
2. The Prophet (SAW) is reported to have contracted marriage with a woman of Bani Ghifar tribe. When he noticed leucocythaemia on the body of the woman he sent her back to her family. Leucocythaemia obviously is a defect that is obnoxious to the people[30]. On the other hand, marriage is contracted for the purpose of creating love and affection between the married couple. Another argument may as well be advanced on the basis of this narrative. As the marriage contract was annulled by the Prophet (SAW) on the ground of leucocythaemia, so the marriage contract may be annulled on the ground of each of such defects that create detestation and extreme abhorrence in the mind. The basis of the annulment of the marriage contract by the Prophet (SAW) was abhorrence caused by leucocythaemia which is as well found in other defects, such as leprosy, madness, AIDS, etc. they may too validly form the basis of the dissolution of marriage.

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[29] Ibn Abdullah b. Maqdisi: Al-Mughni, Cairo, 1347 A.H., Vol. VII, p. 579
[30] Rahman p. 585

3. The Prophet, (SAW) said, "Flee from a leper as you do from tiger". The dissolution of marriage on the ground of leprosy, in practice, is fleeing. If wife has no right to dissolve the marriage on account of leprosy, application of the principle laid down by the Tradition is not possible which Imam Bukhari[31] has narrated.

5). SUBMISSION:

After a thorough study of the various view-points as discussed above one comes to the conclusion that the view that there is no option of dissolution on the ground of defect cannot be held to be correct. One is to agree with the view-point of Imam Abu Hanifah(Rah) and Imam Abu Yusuf(Rah) that the wife has the right of demanding dissolution only in case of the husband's male organ being imputed and of his being impotent. In this respect, one finds the opinions of Imam Muhammad (Rah) and Imam Ibn Taymiyah(Rah) and of Hafiz Ibne Qayyim(Rah) based on beneficial ground, sound logic and juristic analogy as quite preferable[32].

6). MODERN LEGISLATIONS:

In various Muslim countries specific laws have been enacted giving right to the wife of seeking dissolution through Qazi on the ground of husband's suffering from disease as detailed below:-

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[31] It is stated of the Caliph " Umar(Raz) that he saw a leper woman making the circuit (Tawaf) of the House of Allah(SWT) (Kabah). He said to her " O, slave of Allah(SWT)! Had your remained in your house, you would not have caused trouble to the people".Ibn Taymiyah has recorded in his "Fatawa " that he (Hadrat Umar) forbade a leper, with whom he had business dealings, to enter Madina and sent him the article sold outside Madina.

[32] . This is to the effect that any defect that makes the sexual intercourse impossible and becomes the cause of defeating the very purpose of marriage thus it to provide the good ground of demanding dissolution by the wife.

I). LEBANON :

Section 122. When the wife, after her marriage contract, becomes aware of her husband suffering from such a disease as leprosy, leucocythaemia or syphilis so that her staying with him shall prove harmful to her, it would be lawful for her to approach the proper authority and claim dissolution. The authority if it sees the prospect of the disease being cured he would postpone the dissolution for the period of one year. If the disease does not abate during that period and the husband does not consent to the pronouncement of divorce and the wife insists on dissolution that shall be duly effected. Such dissolution, however, cannot be effected on the ground of the husband being blind or lame.

Section 123. When the husband becomes insane the wife will have right to approach the proper authority for dissolution. The authority will provide one year time for medication. If the insanity is not cured the marriage will be dissolved.

II). JORDAN:

Jordan's law on the subject of dissolution on the grounds of defects and diseases is not different from that of Lebanon. Hence Section 83 to 88 of Jordan's "Qanun al-Ahwal al-Shakhsiyah" are in accordance with Lebanon's law.

III). MOROCCO :

Section 54. (1) When the wife finds her husband suffering from diseases and defects like madness, leucocythaemia, consumption of permanent nature getting riddance from which is not possible or it is possible in more than a year's time but the staying of the wife with him (in that period) be not possible without her being harmed, she is entitled to demand divorce from him through the Qazi though the diseases or defect

in him be unknown to the wife from before or after the marriage contract and to which the wife is not agreeable. The Qazi shall allow the husband one year's time. If he gets rid of the disease during that time well and good, otherwise the Qazi shall make the husband pronounce divorce to the wife.

If a woman is aware of the disease (other than the above mentioned diseases) in a man and inspite of it she contracts marriage with him, or the disease overtakes him after the marriage is contracted and the wife expressly or impliedly consents to it, she shall not be entitled to demand divorces on account of that disease.

IV). IRAQ :

(1)[33] When the wife finds her husband to be impotent or finds him suffering form such a disease that impedes him in having sexual intercourse, she is entitled to file a petition in the department concerned for dissolution.

(2) When the wife after the marriage contract finds that her husband suffers from such diseases as leprosy, leucocythaemia, consumption, syphilis, madness on account of which her living with him without harm is not possible or that any one of the diseases has overtaken him afterwards, she is entitled to have recourse to the department concerned.

(3) When the department concerned, after getting the medical examination made, expects the abatement of the diseases mentioned in sub-sections 1 and 2 of this section, it shall postpone the dissolution till the disease abates and the wife shall be entitled not to associate with the husband during that period.

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[33] Section 44. Qanun al Ahwalal Shakhsiyah

(4) If the department concerned does not expect any abatement in the diseases, and the husband refuse to effect divorce and the wife insists on demanding dissolution, the Qazi in the circumstance shall pass a decree of dissolution.

V). SYRIA[34] :

Section 105. The wife is entitled to demand dissolution in the following circumstances: -

(1) The husband suffers from such disease that hinders him in having penetration; Provided that the wife does not suffer from such a disease.

(2) The husband gets mad after the marriage contract.

Section 106 (1) The wife's right of demanding judicial dissolution on the ground of diseases mentioned in the aforesaid section shall lapse if the wife know of those diseases contended with them after her contracting the marriage.

(3) It is however, established that the wife's right of demanding separation on the ground of her husband being important shall in no event lapse.

Section 107. If the diseases mentioned in the aforesaid section are incurable the Qadi shall, in accordance with the demand, grant dissolution between the couple to be effected forthwith. If the disease is curable the Qazi shall postpone the demand for a suitable period, which shall not be for more than a year. If the disease does not abate within that period, the Qazi shall get dissolution effected between them.

VI). INDIAN LAW :

The wife is entitled to get the marriage dissolved by virtue of section 2 of D.M.M. Act 1939.

VII). IMARATE SHARIA'S VIEW:

In *Raisa Khatoon V. Mohd. Mumtaz*[35] the plaintiff said that she was married with the defendant 4 years before the petition of the dissolution of marriage. Soon after the marriage it was revealed that defendant was suffering from leprosy. After four years of marriage the defendant had not fulfilled any marital obligations. There were no symptoms of recovery and the disease was aggravating day by day. So her marriage should be dissolved.

The allegations of the plaintiff were proved by the witnesses and the Qazi quoting the views of Hanafis in case of leprosy dissolved the marriage.

In *Sayeeda Bano V. Mohd. Nizamuddin*[36] the plaintiff said that the defendant was suffering from leprosy. He was also unable to have marital intercourse. She was at her parental home for three and half years. In that period the defendant neither demanded *rukhsati* nor sent her maintenance. So her marriage should be dissolved with him.

On the other hand the defendant said in the written statement that the allegations were false. She had indulged in immoral activities and was about to be divorced that is why she was making such type of allegations. The defendant never came in person to peruse the case. He took the plea of poverty but had also denied the offer of travelling expenses of to and fro.

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[34] Section 105 – 107 Qanun al Ahwalal Shakhsiyah
[35] Case No. 216-11962-1406 AH
[36] Case No. 281-7139-1391 AH
[36] This definition is based on the Hanafi point of view which, for its effects has a wider scope than

The allegations of the plaintiff could not be proved in toto. However, the leprosy was proved by the witnesses. The wife had been assigned the right to get the marriage dissolve to which she opted. So her marriage was dissolved.

7. DISSOLUTION DUE TO INEQUALITY OF THE HUSBAND:

Literally the word *kafat* means equality. Generally two persons are called (kufw) equal of each other who are Muslims, have the same lineage, are free and are equal in profession, wealth and character[37]. In kafat age is not the criteria.

Malik, Karkhi, Hasan Basri and Sufyan Sauri do not accept the rule of inequality as a ground of dissolution.[38] They cite the following precedents in support of their opinion:

(a) Bilal (Raz) a liberated slave was married to an Arab woman.

(b) The Prophet (SAW) has said that an Arab has no precedence over a non-Arab.

(c) The Prophet (SAW) and his Companions (Raz) did not follow the rule.

Truly speaking it is difficult to follow strictly some of the rules laid down by Muslim jurists on this subject, because some of the grounds on which a marriage was considered unequal in the past have now lost their significance. For example, now not much importance is attached to lineage and one comes across a case in which a girl belonging to a Pathan family has been married to a man belonging to a non-Khan family. Perhaps by evolutionary process of human society, an equality in intellectual level i.e. knowledge has gained more importance, probably

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any other school of Islamic Jurisprudence.

[38] Kasani, Vol. II, p. 317. Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp104-109*

due to advancement in education. The Punjab Chief Court, however, held in a case that the inferiority in the social status of the husband does not justify the court to dissolve a marriage.[39]

7(1). ELEMENTS OF *KAFAT:*

i). HANAFI VIEW:

According to Hanafis the elements of *kafat* are:

1. Islam
2. Lineage (*Nasab*)
3. Professional class / Social status (Freedom from slavery)
4. Financial status
5. Moral standard

ii). MALIKI VIEW:

According to Malikis, it is enough for a man to be equal to a woman only in two elements: one is religiousness or piety and the other is freedom from those defects on account of which woman gets the right of dissolution of the marriage, such as leucocythaemia, insanity, leprosy etc. According to Imam Malik (Rah) lineage, freedom, profession and financial position are not so relevant.[40]

Under the Maliki law an unequal marriage contracted by the father of a girl shall be binding on her even if it is for an inadequate

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[39] Jamaat Ali Shah V. Mir Mahmud 38IC, 10.

[40] According to them the only conditions to constitute equality are Islam, piety and means to maintain the wife. They do not attach any importance to the question of lineage, and profession. But there is a difference of opinion whether Imam Malik (Rah) made freedom also a condition of equality in marriage. According to another report, Imam Malik (Rah) made the following conditions as essential for equality in marriage:

(a) Islam or religion
(b) The husband being free of the following defects:
    (i) Leprosy,
    (ii) Leucoderma, and
    (iii) Insanity.

dower. She shall have no right to object the marriage. But she can get a marriage dissolved when the husband is impotent, eunuch or castrated or suffers from leprosy, leucoderma or insanity or is a slave.[41]

Thus, the Malikis differ from the Hanafis in the conception of inequality.

iii). SHAFEYEE VIEW:

According to Imam Shafeyee in kafat, the following three elements are necessary.

1. Lineage
2. Religion
3. Profession[42]

iv). ANALYSIS:

(a). ISLAM:

A husband whose father has embraced Islam and a wife whose father and grandfather both are Muslims, are not regarded as equal (*kufw*). A person who has had only one Muslim ancestor is not the equal of a person who has two or more Muslim ancestors.[43]

After the advent of Islam a person was considered under this rule, to be superior to another whose grandfather had embraced Islam later than the grandfather of the other. This rule must have been based on the fact that people who adopted Islam in the beginning were persecuted and it required great courage and very firm belief to have embraced Islam in its early days. Such people were therefore, considered superior to those

[41] Ibid.
[42] Al Jazari, Vol IV, pp. 64, 58-59.
[43] Fataw Alamgiri, Vol. II, p. 13;

who adopted Islam in later period, when professing of Islam involved no hardships. It is stated in *Fatawa Alamgiri* that this rule did not apply to Arab, but only to the non-Arabs for they felt proud of themselves in this distinction, (i.e. freedom and Islam).[44] To make such distinction, in the present day, is impossible and improper too. Every Muslim after accepting the faith of Islam becomes a brother in religion and he is, according to Islam a kufw of a woman who is even born Muslim. Thus in Islam, as regards *kafat* it is just sufficient that the husband and wife are Muslims, though their forefathers may or may not be Muslims.

(b). LINEAGAE OR NASAB:

According to some jurist equality in lineage is also essential condition for equality in marriage. This concept, however, is alien to Islam that stands itself for removal of all distinctions of caste, creed and colour. The Muslims believe in equality of mankind and there can be no claim of superiority in Islam on the basis of tribe, nation or country.

In the Holy Quran it is stated that the believers are brethren.[45] It is further laid down in the same *surah* of the Holy Quran, "**Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you.**" Here, precedence is given to a human being solely on account of piety, (*taqwa*), so that there should be no discrimination between an Arab and a non-Arab. The Prophet (SAW) has also stressed on it in his sermon on the occasion of his last *Haj* that no one has superiority over other by reason of his nationality or country. Thus he stated. "The Arabs have no precedence over the non-Arabs, nor the non-Arabs over the Arabs, nor the white one over a black except by excelling

[44] Fatwa 'Alamgiri, Vol. II. p. 13;
[45] Holy Quran S 14 A 10

in righteousness."[46] He has thus declared in unequivocal terms that all human beings are equal, regardless of their individual or racial status, and that no one can claim any preference or superiority over others, except by reason of his piety. Moreover, equality in lineage was not a condition of equality in marriage in the early period of Islam. Abdur Raman b. Awf(Raz), a prominent companion, gave his sister in marriage to Bilal(Raz) who was a Negro emancipated slave. Imam Zainul Abidin, the cognatic great grandson of the Prophet (SAW) and a very learned Scholar gave his daughter in marriage to a liberated non-Arab slave. The ruler wrote to him that he had brought disgrace on all the Arabs. In reply the Imam referred to the Ruler the precedents set up by the Prophet (SAW), who had given his own cousin in marriage to Zayd bin Haresa(Raz), a liberated non-Arba slave.[47]

It appears from a historical analysis that the concept of the superiority of the Arabs over non-Arabs developed later and it may be the result of their victories over the Persian and Byzantine empires. Besides this, the Arabs were very particular about maintaining racial purity and considered themselves superior to the non-Arabs on this account. Thus, it is stated in *Sharah Wiqayah* that superiority of the Arabs in respect of marriage is due to the fact that non-Arabs have lost their pedigree (racial purity) by inter-tribal marriages. It also seems likely that non-Arab jurists of later period adopted this view on account of their great reverence for the Prophet (SAW) and attached great importance to everything connected with him. Hence they considered the Arabs to be superior to the non-Arabs, and amongst Arabs they considered the Quraysh tribe, to which the Prophet (SAW) belonged, to be superior to other Arabs.[48] Hafiz Ibn Hajar

[46] Ahmad b. Hambal: 'Musnad', Vol., V. p. 411.
[47] Hedaya Vol. II p. 300
[48] Ubydullah b. Masud; Shara al-Wiqaya (Delhi, 1345 A.H.) Vol. II p117.

has, however, stated that there is no basis or Tradition for making equality in lineage a condition of marriage.[49] This view seems to be correct.

(b) i. HANAFI VIEW:

The Hanafi jurists lay great stress that there should be equality in lineage in marriage.[50] For this purpose they hold that people belonging to the Quraysh are superior to other Arabs while all the other Arabs are superior to the non-Arabs.[51] Arabs excepting Quraysh are considered to be equal to each other, as they were considered notorious throughout the Arabia.[52] This shows that character not only of an individual, but even of a group to which he belonged was taken into consideration in the matter of equality in *nasab*[53].

(b) ii. VIEWS OF OTHER SCHOOLS:

Maliki, Shafi and Hambali view do not considered equality in lineage a condition of equality in marriage.

According to Hanafi jurists, lineage is an important part of kafat. It seems to be based on class distinction which is not permissible in Islam. The conception arose due to prevalent social conditions of the Arabs. Besides Arabia and Indo-Pakistan sub-continent where it is due to the influence of Hindu culture and civilization on Muslims, in no other Muslim country any importance is attached to the equality in lineage relating to the doctrine of *kafat*[54].

(c). PROFESSION (HIRFAH):

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[49] Ibn Hajr al-Asqalani: Fath al Bari, Cairo, 1325 A.H., Vol. IX, p. 104 cited by Rehman p. 201.
[50] Hedaya Vol II p 300.
[51] Fatwa Alamgiri Vol II p. 12.
[52] Ibid.
[53] The Arabs were supposed to be superior to the non-Arabs to such an extent that the marriage of an Arab girl to a non-Arab was considered to be derogatory to the girl's family, however, high the wordly position of the husband might be. Thus, even a non-Arab Ruler is not deemed to be the equal in marriage with in Arab woman (Rehman p. 202).

Another essential condition of equality in marriage, according to the Hanafis, is that the husband should not be carrying on profession, which is inferior to the profession carried on by the members of the wife's family[55]. Abu Yusuf and Muhammad(Rah) hold equality in profession to be a necessary condition of marriage.[56] *Fatawa Qazi Khan* too has held the principle of these two companions (Sahabayn) to be correct[57]. Some jurists hold that there can be no condition of equality in profession as a man can change it at any time. The material time when a man's profession is to be seen is the time of marriage and a subsequent change in his position is of no consequence.[58] The condition of equality in profession according to Abu Hanifah, did not and does not apply to the Arabs, as reported by al-Karkhi, who were and are considered equal irrespective of their professions.[59] But in countries other than Arabia there was a marked difference in social status and standard living among various classes of society, and they did not encourage inter-marriages between them. Profession, social status and respectability were considered to be so closely associated as to be one and the same thing. This condition was generally attached to certain professions while a degree of inferiority was attached to certain other professions on account of their being considered low, so that respectability or importance differed with different

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[54] Ibn Hummam, Damand Afandi, the author of Fathul Qadir and Majmaul Anhur respectively have written that learning has precidence over lineage(Aljazri Vol. IV p. 55)

[55] Ibn Abidin : op. Cit. Vol. ii, p. 330

[56] Hedaya Vol. II p. 301

[57] A number of reports are attributed to Abu Hanifah. According to Azhir al-riwayat, (kitab ul-Asl) he does not make equality in profession an essential condition of equality for marriage, while, according to the other report, he considers it be an essential condition. According to another report both Abu Ysusuf and Muhammad (Rah) hold that profession is not be taken into consideration, unless it is so contmptuous, mean and degrading as to bring disgrace to the woman's family in which case the marriage can be dissolved on this grond as it would be unequal.(Al-Marghinani: Vol. II, p. 301)

[58] Ibn 'Abidin : op. Cit. Vol. ii, p. 331.

[59] Ibid, p. 330

profession[60]. The marriage of a girl whose family carried on a more respectable profession to a person whose family carried on a low profession was considered to bring discredit to the girl's family and thus lowered its prestige.[61] There was also a risk that the girl being used to certain way of living might find it hard to live with people whose standard of living was comparatively very low. Thus, the marriage of the daughter of a merchant to a barber or washerman was looked down upon and was considered to be a disgrace to the girl's family. The distinction of profession was more relevant in old times when families carried on and confined themselves to the same business or profession from generation to generation. They were considered to have a particular trait of character. The importance attached to a particular profession rested on the general opinion of the public, and sometimes differed in different localities. The profession of a sweeper, shoemaker, barber or washerman was considered low while that of a teacher, doctor and government servant considered as respectable.[62] It is stated in al-Durr al-Mukhtar that unscrupulous officials are lower to the lowest professionals even if they are wealthy because their wealth has been earned by corrupt and unlawful means.[63]

But this adherence to one profession by a particular family is no longer a good rule. The result is that persons carrying on a certain profession can no longer be deemed to possess certain traits of character. Hence, the status attached to various professions has undergone a radical change during recent times and the nature of profession cannot be safe guide to determine the equality of a marriage unless the difference is so glaring as to have no doubt in the matter. But there can be no doubt that a

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[60] Hedaya Vol. II, p. 301.
[61] Ibn 'Abidin: Vol. II, p. 331.
[62] A sweeper, cobbler, washerman, or barber was considered lower in respectability than a tailor or a draper. (Ibnul Abidin p. 330-31).
[63] Ibid, p. 330.

marriage may be dissolved when the difference in respect of the professions carried on by the husband and the wife's family members generally is very marked and the wife's family is looked with disgrace on account of the husband's low profession. Thus a marriage between the daughter of a person and his servant, engaged for menial work, can be considered unequal. Such a marriage will obviously be mismatched and is probable to lead to misery and unhappiness for the girl and so may be annulled on the ground of inequality. It is stated in *Raddul Mukhtar* that the status of profession changes from time to time and so must be decided according to the special conditions of the times.[64] Any way this ground is to be used very cautiously. The business has taken such a shape that the one time mean profession has taken the shape of industry with the help of advanced machines.

(d). PROPERTY:

Another condition of equality in marriage, according to the Hanafi relates to the financial condition of the husband. They say equality must exist in respect of financial position and property also. It is considered that a mismatched marriage with respect to financial conditions of the spouses, results in unhappiness. A girl brought up in comfort or luxury may find it hard to live with a husband whose means are very limited so that she shall have to live in a way which she is not accustomed to, and may have to experience great hardships on that account. Such a marriage may end in misery and unhappiness. The Hanafi jurists, therefore, explain that wealth contributes to the prestige of a family while poverty lowers its esteem.

According to a report, both Abu Hanifah, (Rah) and Muhammad (Rah) hold that the financial soundness of a man is to be

[64] Ibid. p. 331.

considered in general because a man may be capable of paying both the dower and the maintenance of the wife and yet may not be the equal to a wife possessing a large property. They consider wealth confers superiority and poverty causes loss of prestige. Imam Yusuf (Rah) on the other hand says that wealth is not to be taken into consideration, as it is an unstable thing that may be acquired in the morning and lost before night.

There is a difference of opinion as to whether a husband will be considered to be wife's equal if he is able either to pay the wife's dower or to maintain her, or that he should able to meet both the liabilities. Abu Yusuf holds that the ability to pay the wife's dower is not necessary condition of equality. He will, therefore, be considered wife's equal, if he is able to maintain her. His reasoning is that payment of dower can be delay, but the payment of maintenance cannot. Abu Hanifah and Muhammad (Rah) do not agree with the view expressed by Abu Yusuf. They contend that the husband should be able to meet the liabilities so as to be the wife's equal in wealth.[65]

The Prophet (SAW) is reported to have said, "A woman is contracted into marriage for four consideration, namely, (i) wealth, (ii) position of her family, (iii) beauty and (iv) virtue, but you must give preference to virtue."[66]

(e). COMMENT:

From the above discussion the fact becomes clear that the Hanafis have led great emphasis on the elements of *Kafat* whereas the Malikis look at it with less strictness. The later hold, only being non-

[65] Hedaya Vol. II p. 320
[66] Wali al-Sin al-Khtib: Mishkat al-Masbih, Delhi, 1350 A.H., vo. ii, p. 267.

Muslim and suffering from particular physical defects to be the causes of inequality. The element necessary that is Islam is common among the entire jurist. Imam Shafeyee does not hold lineage and wealth to be the factors of *kafat*. It so appears that he prefers Islam with its total religious demands as essential and rejects wealth form being included in *kafat* because of its constant fluctuating nature.

The *kafat*, in fact aims at creating love and harmony in the lives of the spouses. The harmony cannot be achieved unless the husband is equal to the wife in most of the things. Hence, limiting the elements of social equality (*kafat*) shall be inexpedient. The Hanafis point of view in principle, appears to be more appropriate, but its practical application in modern times is proving somewhat difficult.

Here it is, necessary to mention that social equality is not a legal condition for the lawfulness or validity of marriage. Consequently Caliph Umar(Raz) Abdullah b Masud, (Raz), Umar b Abdul Aziz (Rah) Ubayd Ibn Umayr. Hammad Ibn Abi Sulayman, Ibn Awn, Imam Malik (Rah) Imam Shafeyee(Rah) and others are not convinced that social equality is an absolute condition in a marriage. Abu Hasan Karkhi and Abu Bakr Jassas of the Hanafis too do not give importance to *kafat* in the matter of marriage.[67]

v). MODERN LEGISLATION:

[67] The traditions in respect of *kafat* that have been quoted by Bayhaqi in his book, " Al-Sunan al-Kubra" excepting one narrated from 'Ali, have been held by Bayhaqi himself to be weak and not worth citing in proof (Raddul Mukhtar Vol. II p. 136).

Modern Legislation on the subject in several Muslim countries is given below:-

I). EGYPT:

In some Muslim countries equality in marriage in certain respects is still considered of great importance. In Egypt spouses should be equal in lineage religion property, piety and profession or social status.

II). TUNISIA :

The rule has however, been abrogated in Tunisia.

III). JORDAN:

Under the Jordanian Law, two person cannot become husband and wife if the difference in their age exceeds twenty years, except with the permission of the Court, which can be obtained only if:

(i) The consent of the party who is younger in age has not been procured by compulsion, and

(ii) The proposed marriage should not be prejudicial to the interest of the younger party[68].

(iii) It is essential for the validity of a marriage that the husband should be equal to his wife in financial status and this means that he should be able to pay her dower and to provide maintenance[69].

(iv) Equality is to be considered at the time of marriage and subsequent imbalance thereof has no effect on marriage.

(v) If the husband is not equal to his wife the Qazi may dissolve the marriage before the discovery of pregnancy[70].

IV). SYRIA :

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[68] Article 21 Qanunal Ahwalal Shaksiya of Jordan
[69] Ibid Art 22
[70] Ibid Art. 27

Equality in Marriage: It is essential for the enforceability of a marriage contract that the man should be equal to the woman[71]

Where a girl contract herself into marriage without her guardian's consent, the marriage shall be valid if the husband is equal to her; if he is not, the guradians can demand dissolution of the marriage[72].

Only a woman and her guardian can object to her marriage on the ground of inequality of the husband[73].

If the wife has become pregnant the right to annul the marriage on the ground of inequality shall be extinguished[74].

Equality shall be ascertained at the time of marriage: its subsequent disappearance shall have no effect[75].

V). MORACCO :

(a) Only the woman herself or her guardian can seek annulment of her marriage on the basis of inequality of the husband[76].

(b) 'Equality' is to be assessed at the time of marriage and shall be ascertained in accordance with custom[77].

It is only the woman herself who can object to any disparity of age beyond the customary limits between her and her husband[78].

After examining the Quranie verses and the words and acts of the Prophet (SAW) one may come to the conclusion that *Kafat* in marriage contract is in itself no condition for the lawfulness or validity of the marriage contract, though it may be advantageous. Its application in the present times is very rear.

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[71] Art – 26 Qanunal Ahwalal Shaksiya of Syria
[72] Ibid Art 27.
[73] Ibid Art. 29
[74] Ibid Art. 30
[75] Ibid Art 31.
[76] Art. 14. (a) Qanunal Ahwalal Shakhsiya
[77] Ibid Art. 14 (b)
[78] Ibid Art. 15

vi). IMARATE SHARIA VIEW:

In *Rafea Khatoon V. Abdus Sami* the plaintiff said that she was married with the defendant. There was normal relation after marriage but after some times it was revealed that the defendant belongs to *Kalal Caste* while she was *Syed.* So, her marriage should be dissolved. In the proof, the hear say evidence had been brought which was not enough to prove the case.

On the other hand the defendant never misguided the plaintiff. What he told her earlier was saying again that he was *Shaikh Siddiqi.*

The Qazi took one by one the entire points & discussed in detail. The Qazi held that the lineage is not relevant in the non-Arab territory. So it is immaterial that to which caste the parties belong. The allegation of the plaintiff that the defendant acted in a drama club, which lowered her prestige, was also rejected mainly due to the reason that she was also an expectator in such drama.

In the last the *Qazi* held that the real matter of demand of dissolution was dowry. Before the marriage the defendant was student of Engineering. It was settled between the parties that the expenses of the studies of the defendant will be met by the plaintiff's father. But the amount offered, was less, due to which the defendant discontinued his studies and he could not take the degree of Engineering. To escape from the real cause the matter of lineage was raised.

The *Qazi* had condemned the greed of the dowry and rejected the petition of dissolution. Here the Qazi has used his inherent power and solved the matter in the light of true Islamic provisions, leaving the boundaries of Schools. Although at every point he quoted the *Fiqah* book.

In *Alima Khatoon V. Mohd. Idrees* the plaintiff said that her marriage was held during her minority by her father. Later on it was

revealed that the defendant was not of the leaneage, which was told by the father of the defendant. Since the marriage was held during her minority, and consummated also during such period she was exercising the option of puberty.

The *Qazi* rejected the petition of the plaintiff saying that the marriage made by the father could not be dissolved by the wife. For this he quoted Shami as the source. The lineage of the defendant was not disproved by the plaintiff. So the petition of dissolution was rejected and the *Qazi* made order of *rukhsati* .

Here the lineage was decided according to the Islamic provision but the plea of the option of puberty was rejected on the weak sources i.e. other than the primary sources of Islamic law[79].

8.DISSOLUTION ON ACCOUNT OF OPTION OF PUBERTY

The right of a minor boy or girl, on attaining puberty[80], of repudiating their marriage got contracted by their guardians during their minority, is called the option of puberty.

The minor girls on attaining puberty have the right of exercising their 'option of puberty' and repudiate their marriage got contracted during their minority by their guardians, including their fathers and grandfathers.

(1). HANAFI VIEW :

According to Hanafi school except Imam Yusuf(Rah)[81] there is consensus of opinion that the marriage of minor boys or girls. got

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[79] Nazim Sunni Dinyat, A.M.U., Aligarh

[80] Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp.98-104*

[81] According to Abu Yusuf a minor boy or girl has not got the option of puberty whether the marriage has been contracted by her father or grandfather or any other guardian. If, however, the marriage has been contraced with an unequal or the dower that has been settled upon is less than the proper dower, then, according to Abu Yusuf and Muhammad the minor girl, on attaining her age of majority can exercise her right of the option of puberty.

contracted during their minority by their guardians, other than their fathers or grandfathers, may, on their attainment of majority, be repudiated by them.[82]

(2). MALIKI VIEW :

According to Malikis, father is only has the right of guardianship in marriage of their minor children, the question of exercising the option of puberty in the marriage got contracted by any guardian other than the father does not arise. Marriage got contracted by the other guardians are invalid.

(3). SHAFEYEE VIEW :

The view of Shafeyees are similar to that of Malikis. However, grandfather has also got the right like father provided father is absent.

Although the scholars of Hanafi School are unanimous on the point that the option of puberty as a matter of pure right cannot be exercised in case of marriage got contracted by the father or grandfather, Imam Yusuf (Rah) and Imam Muhammad (Rah), are of the view that a girl, after attaining her puberty, can exercise her option of puberty in case she has been married on an insufficient dower, or with a socially unequal person inspite of the fact that her marriage was got contracted by her father or grandfather. Imam Abu Hanifa (Rah) is against the right to exercise the option of puberty for the purpose of invalidating such marriage on the ground of mere non-equality or insufficiency of dower.

In this connection Abu Hanifah and other Hanafi jurists rely on two contentions. One is based on the tradition of the Prophet (SAW) and the other on the rule of *istihsan*. The contention based on the tradition is

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2 Fatawa Qazi Khan :, Vol. I, p. 166

that the Prophet (SAW) married with Ayeshah(Raz) on five hundred *dirhams* as dower. The marriage was got contracted by her father during her minority. Likewise, Prophet (SAW) himself got his daughter Fatimah (Raz) married with Ali (Raz) on four hundred *Dirhams* as dower. In both these cases the dower was less than the proper dower.Inspite of it none of them exercised the right of option of puberty.

It is submitted that the argument of these jurists, based on the facts that Prophet, (SAW) married with Ayeshah, and Ali married with Fatimah on less than the proper dower and inspite of that none of them (i.e. Ayeshah or Fatimah) exercised the right of the option of puberty, is not sound. The option of puberty is an optional right; it may or may not be exercised. The non-exercise of the right does not negate its existence at all. It cannot be concluded from the Tradition that Ayeshah or Fatimah (Raz) wanted to exercise the right of the option of puberty but could not do so as the marriages were contracted at the instance of their fathers.

The second argument of the jurists that is based on istihasan is that a father has perfect affection for his children. His guardianship, therefore, is also perfect. He is better suited to guard and take of the rights and interests of his children than the children themselves or any one else. As a father understands the interest and benefits of the children better than the children themselves because of his abundant and solicitude for his children and on the basis of his exercising perfect guardianship over them, it will, as a result, follow that a father or grand father gets the children married keeping all their privileges interests and rights in view. Therefore, the marriages got contracted by them (father or grandfather) ought to be made binding and so effective that it cannot be repudiated by the exercise of the option of puberty.[4]

The above argument that the marriage got contracted by the father or grandfather has been made irrevocable due to their absolute regard for their children and the marriage contracted by other guardians has been made liable to repudiation because of their lesser love is, to mind, unsound due to two reasons : Firstly there is not religious basis of such discrimination, and secondly father and grandfather have as complete a love for their major daughter as they have for minors. If they on their own account get their daughters contracted into marriage why should it be held, as ineffective?

In fact, the argument of the jurists that the father (or grandfather at his place) has greater love than the other guardians for the minor, and their guardianship is perfect hence the minor cannot be given the option of puberty, has no religious basis. The argument depends on pure rationalisation and presumption based on human nature and experience of the time. It is possible that Abu Hanifah and his contemporaries in the light of their experiences were of the view that a father would never act against the interest of his minor children. But due to prevailing conditions the legislature of a country comes to the conclusion that honesty and trust have become a rarity and people are using their discretion wrongly and improperly, its thinking shall then be different from Imam Abu Hanifa (Rah). In England till 1883 a father could freely sell his children. Legal restraints were therefore imposed.[83]

(4). JUDICIAL TREND:

In India till, 1939 the marriages contracted by the father or the grandfather, as guardian could not be got annulled by the exercise of option of puberty. But under the Dissolution of Muslim Marriages Act (VIII of 1939) provisions of Muslim Law relating to suit for dissolution of

marriages by women married under Muslim Law were consolidated and clarified. The wives got contracted into marriages by their fathers and grandfathers or other guadians were treated at par and declared entitled under section 2 sub-section 7 to obtain decrees for dissolution of marriages from Courts through their exercise of option of puberty. In the result, whatever distinction in connection with the right of option of puberty in marriages got contracted by fathers, grandfathers and other guardians and been recognised in the earlier decisions of the Indian Courts disappeared by virtue of this Act which is being fully implemented since then.

(5). IMARATE SHARIA VIEW :

The view of Imarate Sharia regarding the option of puberty is in accordance with the view of Imam Abu Hanifa (Rah.).[84] The marriage made by the father and grand father can not be dissolved by the option of puberty by the wife. If the marriage was made by mother, grand mother or other than father and grand father the marriage would be dissolved on the option of the wife. In the case of *Alima Khatoon* V. *Mohd. Idris*, the Qazi held that the marriage made by the father couldn't be dissolved on the option of puberty of the wife.[85]

9. DISSOLUTION ON ACCOUNT OF ENIMITY CRUELTY OF THE HUSBAND:

[83] Rehman p. 469
[84] For details see supra notes
[85] Fatawa Imarat p. 171

Allah in the Holy Quran says, "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best.

At another place, He says, **"If ye fear a breach, between them twain, appoint (two) arbitrators, one from his family and the other from hers. If they wish for place. Allah will cause their reconciliation."**

The question arises as to who are the addressees in these verses?:-

The first verse asks the couple to act in reconciliation. In the second verse addressing the officials of the State, Allah says, "If you find disagreement between the couple it is incumbent upon you to appoint one arbitrator from the families of each of the couple, with a view to bring about reconciliation in them." It is written in *Tafsir Tabri*, through the narrative of Sayeed b. Jubayr (Raz) that the verses are addressed to *Amer*. Imam Jassas has, as narrated by Suddi, witten that the verses are addresed to husband and wives. But, to be more correct, it is the leaders of the community or the officials of the State that are addressed by the words, *In khiftum* i.e. if ye fear. This (second) Quranic verse has in the background that social order of the Arabs wherein no regular media for dispensing justice was established by a sovereign less society; rather the tribal heads themselves settled disputes arising between the individuals of their tribes. Hence the word, *Khiftum* in this (second) verse firstly means Officials of the State appointed for the purpose i.e. Qazis.

On a study of the above Quranic verse it appears that in this (second) verse the apprehension that requires the appointment of arbitrators is that of disagreement (*Shiqaq*) between the spouses. The literal meaning of the word, *Shiqaq* is discord. It has been derived from the word, *Shiq* that means direction. As the husband and the wife due to

discord between them stand oriented in two directions, the Holy Quran describes the situation by the word, *Shiqaq*.

From the words, "*in urida islaha*" in the above verse, the intention of both the arbitrators is meant; this is according to Ibn Abbas and Mujahid (Rah). That is to say, if both the arbitrators intend reconciliation, Allah would bring about harmony in the couple. Some people assert that by these words the intention of the couple is meant. If they (husband and wife) intend to remedy the situation and tell the arbitrators the truth. God shall bring about reconciliation between them.[3]

(1). THE MEANING OF *HAKAM*:

The term *Hakam* that has been used in the above verse stands for several meanings. In general, it means Official or a Judge or an Arbitrator. Its literal meaning is to forbid as stated by Ibn Abbas.[5] Imam Raghib in his famous work, *Al-Mufradat Fi Gharib al-Qur'an* has said that the real meaning or *hakam* is to restrain something with a view to reform it.[7]

(2). SHAFEYEE VIEW :

Imam Shafeyee has said, "If the husband and wife be apprehensive of dissersion amongst them and take their case to the official, it is incumbent upon him to depute wise and patient arbitrators, one from husband's family and the other from wife's family, to enquire into the real cause of dissension and bring about a settlement between them. It will not be valid for them, even if they consider it proper, to pass order of separation between them except when the husband empowers them to do so. Nor can they give way on the wife's property (i.e. nor can

they get *Khula* effected between them). If the husband and wife are reconciled it is incumbent upon the official to pass such order that should emphasise the spiritual, pecuniary and ethical rights of each against the other.

Allah has said that if they have the intention of improving their relations, Alah shall bring about agreement between them. Allah has not said that separation shall be effected between them. The official concerned, however, has been authorised to enquire of the husband and wife whether they agree to the decision of the arbitrators and whether they give them the right of effecting separation. If the husband gives them that right and both the arbitrators consider it advisable they may, effect separation between the couple. The couple, however, shall not be compelled to give that right to the arbitrators. [11]

• In another book of Shafeyee *fiqh, Al-Mughni al-Muhtaj* it is written that apparently arbitrators (*hakams*) are representatives.[12]

(3). HAMBALI VIEW :

In a book of Hambali *fiqh, Al-Insaf* it is said that the correct view of Hambali school is to the effect that arbitrators are the representatives of the couple. They are not deputed without their (husband and wife's) consent and without being made their representatives.[13]

Imam Ibn Hazam, accordingly, writes in his book, '*Al-Muhalla*' the two arbitrators have no right of getting separation effected between the couple, neither by *khula* nor by any other means".[86]

(4). THE OTHER VIEW :

The second group of jurists is convinced of the authority of the arbitrators to get the separation effected the couple in the event of their

failure in bringing about reconciliation between them. The names of Said b. Musayyib, Said b. Jubayr, Shabi, Imam Malik and Imam Awzai (Rah) are stated to be included in this group. An assertion of Imam Shafeyee is in consonance with the same and one of the two assertions of Imam Ahmad b. Hambal is also said to be in agreement with it. But the final opinions of Imam Shafeyee and Imam Ahmad b. Hambal are that the arbitrators have no power of getting dissolution effected without receiving such authority.

Ibn Rushd stating the rule of conduct of Imam Malik writes that arbitrators have the authority for both the things i.e. either bring about reconciliation or dissolution.

(5).MODERN LEGISLATION :

The view in other Islamic countries in this respect is as under :

I). IRAQ :

Section40 (1)[87] When one of the couple has complaint of receiving injury from the other on account of which leading life together is impossible, or one of the two has complaint of mutual altercation, that one shall have the right of claiming separation through Qadi (court).

(2) Before the Qadi passes some order it is necessary for him to appoint, if available, an arbitrator on behalf of the wife and another on behalf of the husband with a view to bring about reconciliation between them. If the arbitrators are not available, the Qadi shall instead of these two *hakams*, authorise the spouses to choose the two arbitrators. If the spouses fail to choose them, the Qadi himself shall appoint the arbitrators.

II). EGYPT :

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[86] The same is written in a book on Ja'fari *fiqh* "*Mukhtulif al-Shi'ah*" that the arbitrators have no right to get separation effected without the permission of the couple.

[87] Qanun al Ahwal al Shakhsiyah,1959

Section 6.[88] When the wife complains of such cruelty of her husband that it is impossible for her to have permanent matrimonial relationship with him, she shall have the right of applying to the Qadi for getting her separated from the husband. On an application made if the Qadi finds the cruelty proved and no posibility of the rectification of the same, he shall get effected an irrevocable divorce to the wife. If the said application is rejected and the wife files the complaint again and the husband's cruelty is not proved, the Qadi shall, under sections 7,8,9,10,11, appoint two arbitrators.

Section 7. It is essential that the arbitrator be males, bc just and be as far as possible, from the couples family. If they be not from the couple's family they must be well aware of the couple's circumstances and have the power of belonging about re-conciliation between them.

Section 8. It is essential for the arbitrators to find out the cause of difference between the couple and try to ameliorate the situation. If the amelioration, in ordinary course, be possible they should come to a decision in accordance, with the requirements of the case.

Section 9. When the two arbitrators fail in their attempt to bring about amelioration because of the excesses of the husband or because of the excesses from both sides or because of their not being able to know the correct situation, they shall have the power of getting a separation effected between them (the couple) through an irrevocable divorce.

Section 10. It is incumbent upon the arbitrators that whatever decision they give they must place the same before the Qadi and it is incumbent upon the Qadi to deliver judgment in conformity with the requirements of that decision.

III). TUNSIA :

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[88] Qanunal-Ahwak al-Shakhsiyah(No.25 of 1929)

Section 25.[89] When one of the spouses complains of the cruelty perpetrated by the other but has no witness for the same and the official by himself finds it difficult to establish cruelty with either of them, he shall appoint two *hakams* (arbitrators). It shall be incumbent upon the two arbitrators so appointed to make investigation in the case. If they find that they can bring about conciliation between the couple they would do so, but in other cases they shall have to place the matter before the Qadi.

IV). MORCCO :

Section 56.[90] (1) When the wife ascribes to her husband such cruelty that makes intrinsically the leading of life permanently with that husband by a woman of her type impossible, and whatever she ascribes gets proved and the Qadi remains unable to bring about reconciliation between them, he shall pass an order effecting divorce.

(2) When the wife's complaint is rejected and she for the second time files the complaint before the Qadi and fails to prove the same, the Qadi shall appoint two arbitrators with the purpose of bringing about reconciliation between them.

(3) It shall be incumbent upon the arbitrators to find out the cause of diference between the spouses and try to bring about reconciliation between them. If the two arbitrators are unable to bring about reconciliation they shall place the matter before the Qadi who, in the light of their report, shall decide the matter

(Thus under the law of Morrocco, the *Hakams* do not have authority separate the couple.)

V). JORDAN :

[89] Mujkallatul Ahwal al-Shakhsiyah
[90] Mudawwanatul Ahwal al Shakhsilya

Secrtion 96.[91] When the wife has complaints of such cruelty of her husband which make the passing married life with him by a woman of her type impossible, she shall have the right of applying to the Qadi demanding separation. The Qadi, after such complaints are proved before him and he fails in his attempt to bring about reconciliation between them, shall appoint two arbitrators, having in view as regards the following matters :-

(a) It is incumbent that the arbitrators be males, just, capable of bringing about conciliation and be, as far as possible, from the family of the spouses, if it is not possible they may be taken from other families.

(b) It is incumbent upon the arbitrators to find out the cause of difference between the couple and to make an attempt at bringing about conciliation between them and settle the matter, if possible, in best manner.

(c) If the arbitrators fail in bringing about conciliation and in that the husband be at fault they shall pass order for separation effected through irrevocable divorce without compensation. If the wife be at fault or the correct situation does not become known, separation shall be got effected between them with payment of a portion of dower that be in conformity with the fault of each of the couple. If the fault be of the wife alone separation shall be got effected on appropriate compensation paid by her. It shall also be incumbent upon the arbitrators to have the compensatory allowance deposited with themselves prior to such divorce (separation).

[91] Qunun al-Huquq al-A'ilah

(d) If the arbitrators differ between themselves the Qadi shall appoint other arbitrators in place of them or shall, besides the two, appoint from a third family another person as an umpire.

(e) It is incumbent upon the arbitrators; whatever the conclusion they arrive at, that they must submit it to the Qadi. The Qadi in the light of that conclusion, provided the same be based on the principles of *Shari-ah,* shall pass appropriate orders.

Section 97. The order passed for separation shall tantamount to an irrevocable divorce.

(Under the law of Islam, the Hakams may decide about separation, but their decision is to be given\ effect to by the order of the Qadi.)

VI). SYRIA :

Section 112.[92] (1) When any one of the couple has complaints of cruelty against the other on account of which their passing of married life together permanently becomes impossible, they shall have the right of demanding separation through the *Qadi.*

(2) When such cruelty is proved and *Qadi* is unable to bring about conciliation he shall get separation effected between them and the same shall have the force of an irrevocable divorce.

(3) When cruelty is not proved or on the complaint of cruelty by the husband the *Qadi* grants time for conciliation, which shall not be less than a month, and inspite of that the husband insists on his complaint and conciliation is not brought about, the *Qadi* shall appoint two arbitrators from the family of the couple possessing ability on oath that they shall carry out the purpose set before justly and honestly.

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[92] Qanun al-Ahwal al-Shakhsiyah, 1953

Section 113. (1) It shall be incumbent upon the arbitrators that they find out the cause of difference between the couple and hold their sitting in camera under the supervision of the *Qadi*, wherein no one shall be present except the couple and the persons summoned by the arbitrators.

(2) The non-appearance of any one of the couple before the arbitrators, inspite of their having notice of it, shall not in any manner affect the orders passed by them.

Section 114. (1) The arbitrators shall attempt to bring about reconciliation between the couple. When the two arbitrators fail in this and find fault either mainly or completely with the husband, they shall pass orders for separation by way of an irrevocable divorce.

(2) If the fault be mainly for completely of the wife, the arbitrators shall pass orders for separation between the couple in lieu of full or part of the dower (if not paid). In case the dower is to be returned it shall be returned to the husband before the *Qadi* passes the order of separation.

(3) If difference arises between the arbitrators, the *Qadi* shall, in their place, appoint some other person as umpire, or shall appoint with them a third arbitrator after puting him an oath.

Section 115. It shall be incumbent upon the arbitrators to submit report of their findings before the *Qadi*, it shall not be necessary for them to give in the report the reasons for their finding. If the report is proved to be in order it shall be incumbent upon the *Qadi* to give his decision in accordance with the same.

(6). IMARATE SHARIA'S VIEW :

In *Nuzhat Jahan* V. *Tufail Ahmad*[1] the plaintiff said that her marriage with the defendant was made eight years before the petition of

dissolution. The 1st three years of marriage were happy but after that the defendant started cruel treatment. She was beaten, unprovided for and threatened to be stabbed. She was forced to leave her marital home 3 years before and in that period no maintenance was provided to her. The defendant has 2nd wife also who was provided every thing, which was also a discrimination against her. So her marriage should be dissolved.

The defendant said in the written statement that she was not indulged in immoral activities but was also not allowed to meet her *mahram* relations. The allegations were wrongly implicated on him. However he beaten his wife sometimes in the way of entertainment.

The excesses of the defendant were corroborated by the witnesses. He(the defendant) himself accepted the beating.

Thus she was subjected to excesses of the defendant and kept unprovided and uncared which makes her pray reasonable. So the Qazi dissolved her marriage due to cruel treatment of the husband. The cases of *Rashida* v. *Sulaiman*, *Khadija* v. *Habibur Rehman*, *Najma* v. *Saleem*, *Shahjahan v. Sharfuddin*, *Farzana v. Razi Ahmad* and *Bibi Kariman v. Mehboob Ali* were also having similar nature and the marriages were dissolved by the Qazis of Imarate Sharia. In the last case the Qazi held that where the husband had beaten his wife only once or even abused her, she is entitled for dissolution. For this he had quoted the Maliki School.

10. DISSOLUTION ON THE GROUND OF TOUCHING, SEEING NAKED BODY WITH DESIRE (MUSAHIRAT):[92]

It is commanded by the Almighty Allah (SWT)

[92] Maulana Ashraf Ali Thanvi has discussed it in detail in his book *HilatunNajiza pp.91-97*

وَلَا تَنكِحُوا۟ مَا نَكَحَ ءَابَآؤُكُم مِّنَ ٱلنِّسَآءِ إِلَّا مَا قَدْ سَلَفَ ۚ إِنَّهُۥ كَانَ فَٰحِشَةً
وَمَقْتًا وَسَآءَ سَبِيلًا ﴿٢٢﴾ حُرِّمَتْ عَلَيْكُمْ أُمَّهَٰتُكُمْ وَبَنَاتُكُمْ وَأَخَوَٰتُكُمْ
وَعَمَّٰتُكُمْ وَخَٰلَٰتُكُمْ وَبَنَاتُ ٱلْأَخِ وَبَنَاتُ ٱلْأُخْتِ وَأُمَّهَٰتُكُمُ ٱلَّٰتِىٓ
أَرْضَعْنَكُمْ وَأَخَوَٰتُكُم مِّنَ ٱلرَّضَٰعَةِ وَأُمَّهَٰتُ نِسَآئِكُمْ وَرَبَٰٓئِبُكُمُ
ٱلَّٰتِى فِى حُجُورِكُم مِّن نِّسَآئِكُمُ ٱلَّٰتِى دَخَلْتُم بِهِنَّ
فَإِن لَّمْ تَكُونُوا۟ دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَٰٓئِلُ أَبْنَآئِكُمُ

ٱلَّذِينَ مِنْ أَصْلَٰبِكُمْ وَأَن تَجْمَعُوا۟ بَيْنَ ٱلْأُخْتَيْنِ
إِلَّا مَا قَدْ سَلَفَ ۗ إِنَّ ٱللَّهَ كَانَ غَفُورًا رَّحِيمًا

"And marry not women
Whom your fathers married, —
Prohibited to you—
Your wives mothers;
Your step daughters under your
Guardianship, born of your wives.
To Whom ye have gone in, -
No prohibition if ye have not gone in ; -
Wives of your sons proceeding
From your loins;[93]"

Thus the ascendents and descendents of the spouses are prohibited for marriage except where marriage has not been consummated.[94]

[93] Holy Quran S 4 A 22,23

The prohibition also observed where illicit relation is established.[95]

(1). HANAFI VIEW :

The prohibition of affinity is established by sexual intercourse, whether it be lawful or apparently so, or actually illicit. When a man has committed fornication with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grandfathers, how high soever, and to his sons, how low soever.

As this kind of prohibition is induced by sexual intercourse, so it is also occasioned by touching a woman with the hand, or kissing her or looking on her nakedness with desire, whether it be done by right of marriage or of property, or unlawfully, and whether she be a step-daughter or not, for there is no difference in this respect. And if a woman should look on the nakedness of a man, with desire, or touch him with desire, prohibition by affinity would, in like manner be incurred, and her mother and daughter would be rendered unlawful to him. Lying together with desire is equivalent to kissing, and so also is mutual embracing. Desire is necessary in all cases, and prohibition is not incurred by looking on, or touching all parts of the body, except when done with desire.

With regard to touching, the prohibition is equally established, whether it be intentional, or inadvertent, or compulsory, or even in sleep, and apparently whatever part of the person be touched. If a man has touch with his hand the hair of a woman, prohibition would be established without doubt. If he has touched her nail with desire prohibition is

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[94] Tyabji pp 116-159
[95] Hedaya. Vol.II p113

established. It is assumed that there are no clothes between the parties, and if there be a cloth between them so thick that the person touching cannot feel the temperature of the other's body, prohibition by affinity is not established, however much desire may be excited, but if the cloth be so fine that the warmth of her body can be felt by his hand it is established. So also if his hands were applied to the sole of her boot, unless it be so hard as to prevent his feeling the softness of her foot. And when a man kisses a woman with a cloth between them, but is sensible of the cold of her front teeth or of her lip, that is a kiss; and the case is the same with regard to touch. A prolongation of the touch is not necessary; hence it has been said that if a man touches a woman, with desire, and he touched the nose of her daughter, and his desire were increased, the mother would become unlawful to him, though he had withdrawn his hand on the instant. But it is a condition that the female touching be not old enough to have desire. And the *fatwa* is in favour of nine years as the age of desire, and nothing under it. Even actual connection with a female child so young as to have no desire does not occasion the prohibition of affinity. But though a woman has passed the age of desire, she may still give occasion for this prohibition. Desire in the male is also a necessary condition, so that actual connection by a boy of four years old would not induce the prohibition of affinity. While if a boy be of an age that usually admits of sexual intercourse, such intercourse by him is the same as by an adult person. Such a boy is described as one who desires and is desired of women. Desire must in all cases be simultaneous with the touch or sight. If these occur first without desire, and desire is afterwards excited, prohibition is not incurred.

The existence of desire in one of the parties is sufficient, but it is a condition that it shall not diminish at the time of touching or seeing, for if it do so the prohibition by affinity is not incurred.

If a man acknowledges that he has incurred the prohibition by affinity he is to be taken at his word, and the parties are to be separated. And the rule is the same though he should ascribed its occurrence to a time previous to his marriage, as, for instance, if he says to his wife, "I had connection with your mother before your marriage", he is to be taken at his word, and they are to be separated; but he is not to be credited so far as regards the dower, and is accordingly liable for the whole amount specified or agreed upon. When a man kisses or touches a woman, or sees her nakedness, and then says it was not with desire, until it be proved that the act was done with desire; for desire is implied in kissing, but not in touching nor in seeing the nakedness. This, however, is only when the touch is on some other part of the person than the actual nakedness, for otherwise the assertion is not to be credited.

(2). IMARATE SHARIA'S VIEW :

Imarate Sharia follows the Hanafi rule regarding this. However difficulty arises when the wife fails to produce the witnesses. In this situation Qazi gets no authority to dissolve the marriage but the woman is advised not to have relation with the husband. She is also advised to take *khula* from him.

In *Mst. Hafizun* V. *Mohd. Farooque* the plaintiff made a petition for dissolution of her marriage on this ground. She told in the plant that her marriage was made with the defendant 8 years before the petition. After 5 years of the marriage she was subjected to the varieties of excesses. She was, often beaten by the defendant's parents and sister.

Once the defendants father, as he was trying earlier, cohabited with her. So her marriage was to be dissolved from the defendant as she was not lawful for the defendant due to *musaherat*.The witnesses corroborated her statement including the confession of the defendant in the *panchayat*. The witnesses also corroborated the fact of punishment of boycott of the defendant and his father by the *panchayat*. The defendant on the other hand denied the allegations and requested the soli hearing that was accepted and notified. But he could not come to negate the allegation before Qazi. The Qazi mentioning *'Bahrur Raiq'* Vol. 2 p. 107, *Shami* p. 279 and *Durre Mukhtar* Vol. 2 p. 279 , 283 held that if there was *musaherat*, the parties were not allowed to marry and if married they could not continue the same. Since the confession was proved by the witnesses the dissolution was ordered by the Qazi.

In *Bibi Jameela* V. *Jalaluddin* the plaintiff made a petition stating that the defendant's (her husband) father made intercourse with her so her marriage with the defendant was to be dissolved. She produced four witnesses who were unanimous in saying that the defendant had accepted the intercourse of his father with the plaintiff. The Qazi quoting Durre Mukhtar held that if husband acknowledge the intercourse of his father then the marriage will be dissolved. There the husband acknowledged with four witnesses and the condition was fulfilled. So the marriage was dissolved by the Qazi.

In *Hafizan* V. *Kamaluddin* the plaintiff made a petition for dissolution on the ground of *Musahirat*. She stated in the plaint that the defendant's father (i.e. her husband's father) had made illicit relation with her and in that way she was not lawful for the defendant. But in the oral statement at the time of hearing she told that the alleged person only slept

at her bed embraced her. There was no intercourse. The witnesses of the plaintiff say that the defendant had accepted the sleeping of his father with the plaintiff. But both the witnesses were considered insufficient to establish *musahirat*. The allegations of the defendant that she wanted to have relation with another person. It was that who suggested her to make that allegation. But again the defendant failed to prove his allegations. So the Qazi refused to dissolve the marriage and ordered for *rukhsati*.

CHAPTER - 7

COURTS AND IMARAT

"It would be wrong for the courts on point of the nature (the right of the widow to inherit) to attempt to put their own construction on the Quran in opposition to the express ruling of commantators of such great antiquity and authority as the Hedaya and Fatawa Alamgiri"

Privy Council

CH-7: COURT AND IMARATE SHARIA

1. TABLE - A; CASES OF IMARATE SHARIA:

S. NO.	CASE NO.	NAMES	MATTERS	STARTED	DISPOSED	NO OF DAYS CONSUMED
1.	16431	**Asma V. W.A.**	Diss	2.1.18	6.5.18	124
2.	16432	**Hasin V. A.J.**	Diss	3.1.18	1.9.18	238
3.	16433	**Reyazuddin V. N.**	R.C.R	3.1.18	23.10.18	290
4.	16434	**Perveen Ara V. M.R.**	Diss	5.1.18	2.8.18	207
5.	16435	**Amir A. A. V. M.A. & Others**	COMP.	6.1.18	1.7.18	204
6.	16436	**Amina V. S.A.**	COMP.	7.1.18	5.11.18	328
7.	16437	**Shabnam Perveen V. A.G.F.**	R.C.R/Dismissed	7.1.18	25.7.18	198
8.	16438	**Chand.S. V. R.**	R.C.R/Dismissed	7.1.18	11.1.178	04
9.	16439	**Roshan.A V. A.R.**	Diss/Dismissed	11.1.18	24.1.18	373
10.	16440	**Mussarat. J V. I.**	Diss	13.1.18	11.7.18	178

11.	16441	**Amina.B V. I.G.&Other.**	Diss/R.C.R	13.1.18	30.3.19	437
12.	16442	**Anisa V. A.**	Diss	16.1.18	9.2.18	23
13.	16443	**Kalam V. S.**	R.C.R/Dismissed	16.1.18	9.4.18	83
14.	16444	**Kausar V. S.**	R.C.R/Dismissed	17.1.18	19.1.189	362
15.	16445	**Abdul.K. V. F.B.**	R.C.R/Dismissed	17.1.18	10.6.18	143
16.	16446	**ShahJ. V. S.**	Diss	18.1.18	16.11.18	328
17.	16447	**Ramzan V. T.**	R.C.R/Dismissed	17.1.18	3.4.19	436
18.	16448	**Zafar V. B.**	R.C.R	19.1.18	7.8.18	198
19.	16449	**Ghazala F. V. A.H.**	Divorce/Not Proved	21.1.18	3.3.18	77
20.	16450	**Ashrafi B. V. Z.H.**	Diss	24.1.18	21.9.18	237
21.	13451	**Bilqis J. V. R.R**	Diss/R.C.R	24.1.18	12.7.18	168
22.	16452	**Afsari B. V. S.**	DowerDiss/ Dismissed	25.1.18	22.5.18	177
23.	16453	**Md. A. V. S.**	Good Conduct	28.1.18	25.2.18	27
24.	16454	**Salim V. K.N.**	R.C.R/Comp.	28.1.18	22.6.18	144
25.	16455	**Ghaffar V. N.B.**	R.C.R	28.1.18	4.2.19	366
26.	16456	**Zaibun N. V. A.**	Diss	28.1.18	10.6.18	132
27.	16457	**Khursheeda V. A.**	Diss	4.2.18	27.5.18	111

28.	16458	**Hadisa V. N.M**	Diss	4.2.18	27.3.19	413
29.	16459	**Alimuddin V. Husna & Others**	R.C.R/Dismissed	6.2.18	25.7.18	169
30.	16460	**Sanjida V. A.**	Diss	9.2.18	10.6.18	121
31.	16461	**Saleema V. K.**	Diss/Dismissed	10.2.18	25.7.18	165
32.	16462	**Kausar Bano V. A.A**	Diss/Khula	10.2.18	6.4.18	56
33.	16463	**Shahida V. N.**	Diss	11.2.18	22.7.18	161
34.	16464	**Nikhat P. V. Ahsan**	N.C Order/Diss	12.2.18	16.6.18	124
35.	16465	**Sabila V. S.H**	Diss/Dismissed	13.2.18	10.6.18	117
36.	16466	**Saira V. A.K**	Diss	13.2.18	3.8.18	170
37.	16467	**Yasmin V. R.A**	Diss/Rukhsati	14.2.18	7.7.18	203
38.	16468	**Wasila V. M.**	Diss	16.2.18	6.9.18	200
39.	16469	**Tayyiba V. M.A**	Diss/Dismissed	17.2.18	10.6.18	113
40.	16470	**Amin V. Rehana**	Rukhsati/Divorce	18.2.18	20.4.18	62
41.	16471	**Rafi V. Abisa**	R.C.R/Dissmissed	18.2.18	6.9.18	198
42.	16472	**Rukhsana V. S. H.**	Diss/Dismissed	19.2.18	4.11.18	255
43.	16473	**Rumana W V. I. A.**	Diss/Dismissed	24.2.18	31.3.18	06
44.	16474	**Abbas V. Shabina**	R.C.R/Maintainance	25.2.18	2.10.18	215

45.	16475	**R. Tara V. A.**	Diss/Divorced	1.3.18	15.5.18	74
46.	16476	**Farzana V. G.S.**	Good Conduct	1.3.18	2.5.18	61
47.	16477	**Shiba T.B.H V. A.A**	Khula	1.3.18	1.3.18	0
48.	16478	**Nasreen B. V. AH.**	Diss	1.3.18	4.11.18	243
49.	16479	**Naseem V. S.**	R.C.R/Diss	13.3.18	21.2.19	308
50.	16480	**Qamisa V. M.A**	Diss/Dissmissed	13.3.18	14.10.18	211
51.	16481	**Tahira V. F.A**	Diss/Compromise	15.3.18	17.8.18	148
52.	16482	**Sanjida B. V. M.**	Diss/Compromise	15.3.18	15.4.18	30
53.	16483	**Sajida V. T.**	Diss/Dissmissed	17.3.18	3.5.18	46
54.	16484	**Sanohar P. V. J.A.**	Diss/Khula	20.3.18	22.7.18	122
55.	16485	**Shakila V. A**	Diss/Dissmissed	21.3.18	6.9.18	165
56.	16486	**Nibiyya V. Chhedi**	Diss/Dissmissed	21.3.18	5.11.18	226
57.	16487	**Khadija V. Masood**	Diss	24.3.18	4.4.19	370
58.	16488	**Gule Arzan V. T.**	Diss/Dissmissed	24.3.18	12.7.18	144
59.	16489	**Warsila V. F.**	Dec. of Death	24.3.18	10.7.18	134
60.	16490	**Noorun N. V. S.**	Diss	24.3.18	4.11.18	220
61.	16491	**Atiq A, V. Sadab P.**	R.C.R.	25.3.18	17.9.18	172

62.	16492	**Aiyesha V.J.**	Diss	25.3.18	7.9.18	158
63.	16493	**Agrawal V.S.**	Diss	27.3.18	2.7.18	95
64.	16494	**Sahab A.V., Mahjabin P.**	R.C.R.	27.3.18	2.7.18	95
65.	16495	**Committee Jamia Madinatul Ulum**	Perm.	29.3.18	6.4.18	07
66.	16496	**Roshan Ara V.R.**	Diss	30.3.18	15.4.19	375
67.	16497	**Musarrat V.N.A.**	Diss/Desmissed	30.3.18	21.10.18	201
68.	16498	**Mehmood A.V., Ishrat P.**	R.C.R.	2.4.18	10.8.18	128
69.	16499	**Nirmala S.V.J.**	Dower/Dismissed	2.4.18	4.12.18	342
70.	16500	**Ajmeri V.S.**	Diss	4.4.18	7.9.18	153
71.	16501	**Sanaullah V. Shahnaz**	Confir Div	5.4.18	18.7.18	86
72.	16502	**Munm V. MA**	Diss	5.4.18	7.9.18	152
73.	16503	**Mumtaz V. Naghma**	R.C.R./Dismissed	6.4.18	6.9.18	90
74.	16504	**Saira V. SA**	Diss	6.4.18	30.10.18	204
75.	16505	**Committee**	Permission	8.4.18	26.4.18	18
76.	16506	**Naznin V. I.**	Diss/RCR	9.4.18	29.7.18	18
77.	16507	**Mumtaz V. Amina**	RCR/Comp	9.4.18	14.5.18	35
78.	16508	**Mahjabin N. V. A.A.**	Diss	9.4.18	10.8.18	121

79.	16509	**Shabnam V. I.**	Diss/Dismissed	11.4.18	12.8.18	121
80.	16510	**Shakir V. Safia**	RCR/Diss	11.4.18	21.10.18	200
81.	16511	**Naz P. V. N.**	Diss/Dismissed	13.4.18	17.11.18	214
82.	16512	**Rizwana V. S.**	Diss	13.4.18	23.1.19	280
83.	16513	**Shahida V. M.**	Diss/Khula	14.4.18	3.2.19	289
84.	16514	**Shakila V. M.A.**	Diss/Khula	14.4.18	9.11.18	205
85.	16515	**Zinal Kausar V. W.**	Diss/Khula	16.4.18	23.5.19	503
86.	16516	**Gulnaz V. Q.**	Diss	16.4.18	3.1.19	257
87.	16517	**Qamar Jahan B. V. A.A.**	Diss	18.4.18	17.8.18	119
88.	16518	**Qadira V. M.**	Diss/Dismissed	18.4.18	17.1.19	269
89.	16519	**Zulkha V. A.S.**	Good Beh	19.4.18	28.5.18	39
90.	16520	**Habiba V. R.A.**	Diss/Dismissed	19.4.18	6.9.18	137
91.	16521	**Abida V.S.**	Diss	20.4.18	24.1.19	274
92.	16522	**Husna B. V. A.J.**	Diss/Dismissed	20.4.18	21.10.18	181
93.	16523	**Javed A. V. Shereen**	RCR/Comp	22.4.18	24.11.18	212
94.	16524	**Ishrat J. V. M.**	Diss/Comp	22.4.18	12.7.18	80
95.	16525	**Bilgis V. G.**	Diss/Dismissed	25.4.18	5.1.19	250

96.	16526	**Mahjabin V. S.**	Diss/R.C.R.	25.4.18	17.9.18	142
97.	16527	**Farooq A. V. Noor J. B.**	Fix Dower	26.4.18	1.2.19	275
98.	16528	**Shaheen S. V. H.R.**	Diss	26.4.18	29.12.18	243
99.	16529	**Naseema V. B.**	Diss	24.4.18	7.10.18	163
100	16530	**Mahrun V. Y.**	Diss	21.5.18	7.10.18	165
101	16531	**Islam V. Noor Jahan**	RCR/Diss	3.5.18	3.9.18	120
102	16532	**Sami Ara V. S.H.**	Diss	4.5.18	24.1.19	260
103	16533	**Sahena P. V. A.Z.**	Diss/Diss	5.5.18	17.11.18	192
104	16534	**Mahjabin V. A.A.**	Dower	8.5.18	4.2.19	266
105	16535	**Shabana V.Q.**	Diss/Khula	10.5.18	21.11.18	190
106	16536	**Rehana V. A.S.**	Diss	11.3.18	20.9.18	129
107	16537	**Shahana V. Q.**	Diss	11.5.18	20.9.18	129
108	16538	**Sanjida V. A.A.**	Diss/Maint	13.5.18	17.1.19	244
109	16539	**Rais V. Fauzia B.**	Poss of Child	14.5.18	1.2.19	270
110	16540	**Najma V.M.**	Diss	18.5.18	30.10.18	162
111	16541	**Zubaida V.A.**	Diss	15.5.18	19.2.19	274
112	16542	**Zahida V. Naim**	Diss	17.5.18	23.4.19	336

113	16543	**Noor Jahan V. A.H.**	Diss/Khula	17.5.18	17.8.18	70
114	16544	**Sanjida V. S.P.**	Diss/Khula	20.5.18	14.11.18	174
115	16545	**Khushbun N. V. N.**	Diss	22.5.18	29.1.19	240
116	16546	**Sakina V. S.**	Diss/Dismissed	27.4.18	1.2.19	274
117	16547	**Husna B. V. F.I.**	Diss	28.5.18	3.12.19	695
118	16548	**Nasima V. Y.**	Diss/Dismissed	28.5.18	1.12.18	183
119	16549	**Muiz V. Perveen**	RCR/Mainte	4.6.18	28.8.18	84
120	16550	**Shamima V. A.A.**	Diss/RCR	4.6.18	2.1.19	208
121	16551	**Rashida V. K.**	Diss/RCR	8.6.18	24.10.18	138
122	16552	**Ansar N. V. Nasimus Sehar**	RCR/Comp	18.6.18	20.8.18	74
123	16553	**Zazina V. M.**	Diss/Divorce	12.6.18	12.10.19	480
124	16554	**Shahina H. V. T.N.**	Conf. Marriage	13.6.18	12.10.19	489
125	16555	**Sakina V. T.**	Diss	16.6.18	2.7.19	374
126	16556	**Hasan Jabin V. K.A.**	Diss/Maint	17.6.18	20.7.19	393
127	16557	**Sajida V. A.H.**	Diss	18.6.18	24.1.19	216
128	16558	**Shahid A. V. Masiha**	RCR/Dismissed	18.6.18	14.3.19	266
129	16559	**Qadir H.V. Afsana**	Poss of Child	20.6.18	4.12.18	164

130	16560	**Naim V. Chand Tara**	RCR/Dismissed	22.6.18	22.1.19	210
131	16561	**Farida V. A.**	Diss/Dismissed	22.6.18	27.1.19	215
132	16562	**Masarrat J. V.M.**	Diss	26.6.18	2.4.19	276
133	16563	**Shamshad A. V. Shakila**	RCR	27.6.18	10.12. 18	171
134	16564	**Ainul H.D. V. Noorjahan**	RCR/Sep. Res.	29.6.18	26.6.19	357
135	16565	**Akbar A. V. Noor Jahan**	RCR/Dismissed	1.7.18	25.11.18	144
136	16566	**Infat A. V. Ismat Ara**	RCR	2.7.18	23.6.19	351
137	16567	**D. Fatima V. N.A.**	Diss	4.7.18	26.8.19	412
138	16568	**Nasreen V.A.**	Diss/RCR	4.7.18	28.5.19	324
139	16569	**Jahan Ara V. K.**	Maint	5.7.18	24.12.18	169
140	16570	**S.A. V. Rashida**	RCR	5.7.18	26.3.19	261
141	16571	**Ashraf A. V. Fahmida**	RCR	8.7.18	26.1.19	198
142	16572	**Sharfuddin V. A. Ara**	RCR/Dismissed	8.7.18	30.3.19	262
143	16573	**Chand Tara V. N.**	Diss	10.7.18	28.4.19	288
144	16574	**Samun V. A.M.**	Diss/Dissmissed	11.7.18	3.1.19	173
145	16575	**Reshma V. C.**	Diss/Dismissed	11.7.18	8.4.19	267
146	16576	**Zeenat P. V. M.A.**	Conf. of Div.	12.7.18	22.1.19	190

147	16577	**Raisa V. S.A.**	Diss	14.7.18	22.5.19	308
148	16578	**Anwari V. Yunus**	Diss/Dismissed	17.7.18	24.12.18	157
149	16579	**Ashghari V. A.**	FMO/Dismissed	17.7.18	12.2.19	205
150	16580	**Javed A. V. Naghma J.**	RCR/Comp.	17.7.18	1.9.18	44
151	16581	**Saira V. N.S.**	Diss/Div.	18.7.18	4.4.19	256
152	16582	**Tariq Z. V. Naaz P.**	RCR/Dismissed	21.7.18	15.9.19	630
153	16583	**Saleem V. Zarina**	RCR/Dismissed	24.7.18	4.11.18	100
154	16584	**Zeba P. V. P.A.**	F.M.O./Dismissed	24.7.18	13.11.19	679
155	16585	**Subhan A. V. Hashim N.**	RCR	25.7.18	30.6.19	335
156	16586	**Khairun N. V. M.A.**	Diss/Dismissed	26.7.18	13.6.19	317
157	16587	**Rashida V. U.**	Diss/Dismissed	29.7.18	15.6.19	316
158	16588	**Fatima V. S.**	Diss	29.7.18	5.10.19	426
159	16589	**Saghir V. Zarina**	RCR/Khula	30.7.18	28.1.19	178
160	16590	**Gulshan A. V.S.**	Diss/Khula	30.7.18	28.2.19	208
161	16591	**Naznin P. V. M.**	Khula	1.8.18	1.9.18	30
162	16592	**Naushad V. Yasmin**	RCR	2.8.18	13.5.19	281
163	16593	**Guddu V. Ishrat J.**	RCR	5.8.18	12.2.19	187

164	16594	**Tara V. W.**	FMO/Comp	7.8.18	2.12.18	115
165	16595	**Qamrun N. V.A.**	Diss	10.8.18	14.7.19	334
166	16596	**Afsana V. S.A.**	Diss/Dismissed	16.8.18	11.2.19	175
167	16597	**Azima V. R.M.**	Diss/T. Maint	20.8.18	4.2.19	164
168	16598	**Roshan B. V. H.A.**	Diss/3 Month	20.8.18	27.2.19	187
169	16599	**Mumtaz V. Mumtaz B.**	RCR/Khula	22.8.18	24.4.19	242
170	16600	**Juratunnisa V. M.**	Diss/Dismissed	22.8.18	17.1.19	145
171	16601	**Anwari V. M.**	Good Beh.	22.8.18	29.1.19	159
172	16602	**Nooru Sehar V. Z.A.**	Diss/Dismissed	26.8.18	1.2.19	155
173	16603	**Anjum V. F.A.**	Khula/Dismissed	28.8.18	21.5.19	263
174	16604	**Shahnaz V. Z.**	FMO/T. Maint	28.8.18	8.5.19	250
175	16605	**Roshan A. V. S.A.**	RC V. Maint	30.8.18	4.5.19	244
176	16606	**Ekramuddin V. K.B.**	RCR/Dismissed	1.9.18	13.3.19	192
177	16607	**Shamim A. V. M.A.**	RCR/Khula	4.9.18	20.10.18	46
178	16608	**Sajida V. M.I.**	Diss/Dismissed	14.9.18	29.2.19	165
179	16609	**Khalida V.S.**	Diss	14.9.18	29.1.19	135
180	16610	**Jamal Akbar V. S.A.**	Sale	15.9.18	17.6.19	265

181	16611	**Nayyar V. M.N.**	Appeal/Dismissed	22.9.18	17.6.19	265
182	16612	**Hena A. V. I.A.**	Khula	10.10.18	12.10.18	362
183	16613	**Sajida V. S.**	Diss	12.10.18	3.5.19	201
184	16614	**Sharika B. V. M.A.**	Diss	12.10.18	24.3.19	162
185	16615	**Dehzadi V. A.**	Diss/Dismissed	16.10.18	12.2.19	116
186	16616	**Rukhsana B. V. N.A.**	Diss/Khula	17.10.18	19.3.19	152
187	16617	**Tara V. Ruma**	Good Beh/ Warned	17.10.18	27.3.19	160
188	16618	**Jamaratan V. Maqsood**	Diss	20.10.18	22.5.19	212
189	16619	**Sajida V. A.H.**	Dower/Dismissed	20.10.18	01.2.19	101
190	16620	**Khursheed A. V. A.B.**	Obed./Comp.	25.10.18	28.2.19	123
191	16621	**Sifan V. N.**	Diss/Dismissed	26.10.18	28.3.19	253
192	16622	**Wali A. V. G.**	RCR/Comp.	26.10.18	26.1.19	90
193	16623	**Adil V. N.**	RCR/Dismissed	20.10.18	15.11.19	370
194	16624	**Rashida V. A.M.**	Diss/T. Maint.	30.10.18	13.2.19	103
195	16625	**Naushaba V. I.**	Diss/RCR	1.11.18	22.2.19	141
196	16626	**Shamima V. U.**	Diss	1.11.18	3.4.19	152
197	16627	**Afsana V. Maqsad**	Diss	2.11.18	23.10.19	351

198	16628	**Samina V. G.**	Diss	2.11.18	15.4.19	163
199	16629	**Shahnaz B. V. Abrar**	Diss	3.11.18	20.8.19	267
200	16630	**Keli V. W.**	Diss/Div	3.11.18	20.8.19	267
201	16631	**Husn B. V. Zakaullah**	Diss	4.11.18	3.5.19	176
202	16632	**Shaista P. V. A.A.**	Diss/Dismissed	5.11.18	19.7.19	235
203	16633	**Bilquis V. A.M.**	Diss	5.11.18	27.3.19	140
204	16634	**Mehrun Nisa V. M.**	Diss/Dismissed	8.11.18	15.7.19	247
205	16635	**Tseif B. S.**	Diss	8.11.18	26.8.19	288
206	16636	**Rehana V. R.**	Diss	9.11.18	3.5.19	172
207	16637	**Afsana V.M.**	Diss	9.11.18	5.4.19	146
208	16638	**Farzana V. I.A.**	Diss/Div	10.11.18	3.7.19	130
209	16639	**Rubi V. S.**	Diss	15.11.18	30.3.19	135
210	16640	**Jamila V. A.A.**	Diss/Dismissed	16.11.18	6.3.19	109
211	16641	**Tayyabun N. V. A.**	Diss	18.11.18	28.4.19	160
212	16642	**Murtaza V. S.**	RCR	21.11.18	9.4.19	148
213	16643	**Nabila V. N.**	Diss	22.11.18	6.5.19	164
214	16644	**Wasi Alam V. S.N.**	RCR/Diss	23.11.18	11.3.20	468

215	16645	**Sayeeda V. S.**	Good Behave/ Comp	22.11.18	25.7.19	243
216	16646	**Tanzim A.I. V. N.B.**	RCR/Condition	25.11.18	2.5.19	157
217	16647	**Kulsum V.M.**	Diss/Dismissed	25.11.18	14.4.19	139
218	16648	**Bilquis J. V. R.R.**	Diss	26.11.18	17.6.19	201
219	16649	**Neyaz A. V. N.**	RCR/T. Maint.	28.11.18	21.7.19	233
220	16650	**Sabina B. V. S.A.**	Diss	29.11.18	14.4.19	135
221	16651	**Noor A. V. N.**	RCR	29.11.18	7.7.19	218
222	16652	**Amina V. T.H.**	Diss	1.12.18	22.6.19	201
223	16653	**Naznin V. J.**	Diss	1.12.18	14.4.19	133
224	16654	**Samina V. A.**	Good Behave	2.12.18	3.11.19	328
225	16655	**Mehmood A. V. G.R.**	Appeal	2.12.18	23.9.19	291
226	16656	**Serun N. V. M.**	Diss/Dismissed	2.12.18	18.5.19	166
227	16657	**Shamim V. Asma**	RCR/Dismissed	2.12.18	14.4.19	132
228	16658	**Saghirun V. A.K.**	Diss/Dismissed	4.12.18	14.3.19	100
229	16659	**Qaisar J. V. M.**	Diss	6.12.18	18.5.19	152
230	16660	**Shakeba V. R.A.**	Diss/Khula	21.12.18	6.5.19	135
231	16661	**Anwari V. Q.A.**	Diss	21.12.18	13.3.20	352

232	16662	**Najmna V. S.**	Diss	24.12.18	30.6.19	186
233	16663	**Safun N. V. I.**	Diss	24.12.18	18.7.19	204
234	16664	**Sherun N. V. M. J.**	Diss/Dismissed	25.12.18	29.4.19	124
235	16665	**Saifun N. V.K.**	Diss/Khula	27.12.18	16.8.19	229
236	16666	**Public V. Mad. Comm**	Good Admin	27.12.18	29.4.19	122
237	16667	**Noor Jahan V. A.H.**	Diss	27.12.18	4.5.19	127
238	16668	**Rukhsana V. Sabbar**	Diss/Dismissed	27.12.18	30.6.19	183
239	16669	**Murshid A. V. T.B.**	RCR/Comp	27.12.18	3.7.19	183
240	16670	**Nazreen V. J.**	Diss	29.12.18	3.5.19	124
241	16671	**Asfahani V. A.M.**	Dist. of Prop	29.12.18	12.2.19	43
242	16672	**Zarina V. R.**	Diss	29.12.18	4.5.19	125
243	16673	**Sharfuddin V. K.N.**	RCR	29.12.18	19.8.19	230
244	16674	**Zahana V. M.A.**	Diss	29.12.18	5.10.19	276
245	16675	**Abdul V. H.R.**	Prop. Rig/Dismissed	29.12.18	5.10.19	276

GRAND TOTAL **54779**

AVERAGE: 54779/245 = 223.58 days/case

2. TABLE B; CASES OF IMARATE SHARIA:

S.No.	NAME	PLACE	MATTER	STARTED	DISPOSED	No. of DAYS CONSUMED
1	TahirBegum V. Md. Fakre Alam	Gaya	Certificate (Marriage)	1.1.17	6.1.17	5
2	Qamar Tabassum V. Md. Ashraf	Gaya	"	1.1.17	6.1.17	5
3	Ajmeri Khatoon V. Shamim Akhter	Hazari Bagh	Dissolution	1.1.17	16.1.17	225
4	Nasreen Khatoon V. M.Tauqir Alam	Aurangabad	"	3.1.17	12.9.17	251
5	Md. Wali Alam V. Rasheeda	Patna	"	4.1.17	22.5.17	138
6	Rukhshanda Jabir V. Ziauddin	Siwan	Certificate (Marriage)	8.1.17	9.1.17	1
7	Safina V. Israr Abul Kalam	Muzaffarpur	"	13.1.17	14.1.17	1
8	Nurun Nisa V. Sayed Azam	Patna	"	13.1.17	13.1.17	0
9	Shabana V. M. Wahabal Haque	Patna	Dissolution	13.1.17	13.10.17	330
10	Talat Parveen V. M. Waseemuddin	Patna	Certificate (Marriage)	13.1.17	14.1.17	1
11	Nazim V. M. Sanaullah	Patna	Dissolution	14.1.17	17.9.17	240
12	Rumana Naz V. M. Rizwan Azhar	Hazari Bagh	Certificate (Marriage)	14.1.17	16.4.17	2
13	Mst. Saheha V. M. Mukhtar	Bhojpur	Dissolution	15.1.17	9.6.17	150

14	Fatima Sher V. M. Tanweer	Nalanda	Certificate (Marriage)	16.1.17	17.1.17	1
15	Tarannum V. Moiz Qadri	Bangladesh/ Aurangabad	Certificate (Marriage)	16.1.17	17.1.17	1
16	Perveen Ara V. M. Atiqullah	Hazari Bagh	Dissolution	16.1.17	17.3.17	60
17	Siman Tayyat V. Aijz Faizi	West Bengal/ Patna	Certificate	17.1.17	20.1.17	3
18	Rubina Huda V. M. Aziz Haider	Gaya	"	17.1.17	20.1.17	3
19	Rahela Nabi V. M. Shahid Iqbal	Gaya	"	18.1.17	18.1.17	0
20	Samina V. M. Fared	Patna	Dissolution	18.1.17	18.10.17	270
21	Roshan Parveen V. M.A. Ismail	Ranchi	"	18.1.17	4.2.17	16
22	Firdaus Jahan V. Ilham Yazdani	Gaya/ Pakistan	Certificate	20.1.17	21.1.17	1
23	Nilofar Naz V. M.K.Malik	Nalanda	"	21.1.17	23.1.17	2
24	Afshan Subuhi V. Aslam Husain	Patna	"	21.1.17	23.1.17	2
25	M. Kalamuddin V. Ishrat Perveen	Patna	"	21.1.17	25.8.17	214
26	Shain Rehman V. Javed Anwar	Patna	Certificate	21.1.17	25.8.17	4
27	M. Kalimuddin V. Hasbun	Patna	"	21.1.17	24.3.17	63
28	Shamim Alias Shagufta Rain V. Abdul Majed	Darbhanga/ Bangladesh	Appeal	23.1.17	25.3.17	62

29	Fareda Anjum V. Faiyaz	Patna	Certificate	23.1.17	25.1.17	2
30	Rubi Tabassum V. Audalib Ahsan	Patna/ Pakistan	"	24.1.17	24.1.17	0
31	M.Nasruddin V. Taslima Bibi	Buxar	"	25.1.17	13.11.17	312
32	M. Usman V. Nazma	Patna	"	25.1.17	5.5.17	122
33	Naushaba V. Fazur Rab	Gaya	Certificate	27.1.17	27.1.17	0
34	Shabana V. M.Shafi	Patna	Dissolution	28.1.17	1.3.17	32
35	M. Serajuddin V. Saqia	Patna	"	28.1.17	6.4.17	64
36	Talat Jahan V. M.S. Rahmatullah	Patna	Certificate	28.1.17	1.2.17	32
37	Sharfa Rehman V. Shaukat Rehman	Patna	"	28.1.17	2.2.17	33
38	Sima V. Ahmad Raza	Patna/ Calcutta	Dissolution	1.2.17	26.2.17	25
39	M. Israil V. Marbubal	Bhojpur	"	1.2.17	11.3.17	40
40	Amina V. M.Afzal Husain	Dhanbad	Dissolution	2.2.17	23.4.17	81
41	Ashrafi V. Jalaluddin	U.P/ Gaya	"	3.2.17	2.6.17	119
42	M. Salim V. Husna	Patna	"	3.2.17	9.7.17	156
43	Zubaida V. M. Rafique	Son Bhadra	Dissolution	5.2.17	19.12.17	314
44	Naimun Nisa V. Wasi Ahmad	Rohtak	"	5.2.17	8.7.17	153
45	M. Juwaib V. Anwari	Champaran(E)	"	8.2.17	8.7.17	150
46	Ajmiran Nisa V. M. Jamshed	Garhwal/ U.P	Dissolution	8.2.17	11.5.17	93

47	M.Shamim V. Bashiran Bibi	Deoghar	"	9.2.17	4.8.17	175
48	Fatima V. M. Jamaluddin	Bhojpur/ Varanasi	Dissolution	9.2.17	22.5.17	103
49	Mushtasi V. M. Ansar	Bihar Sharif	G. Treatment	13.2.17	29.4.17	77
50	M. Firoz V. Razia	Patna	"	13.2.17	8.4.17	55
51	Sohrab V. Juli	Vaishali		14.2.17	23.12.17	309
52	Farzana V. M. Jamaluddin	Nalanda	Dissolution	14.2.17	9.8.17	175
53	Talat Shahin V. M. Shafique	Patna	"	15.2.17	11.4.18	56
54	Noor Aisa V. M. Asghar	Patna	Dissolution	15.2.17	30.12.17	315
55	Fahumula Haque V. Maryam	Samastipur	Confirmative of Divorce	17.2.17	8.7.17	141
56	Nafisa V. M. Shamim	Patna	Dissolution	17.2.17	2.7.17	135
57	Reshma V. M. Shakeel	Nalanda	"	17.2.17	20.8.17	183
58	Gulam Rasool V. Rukhsana	Gridhi		17.2.17	1.6.17	104
59	Gulshan V. M. Nasim	Patna	Solution of Dissolution	20.2.17	4.4.18	44
60	Sadrun Nisa V. Zakir Husain	Rohtas	Dissolution	20.2.17	20.11.17	270
61	Warisa V. M. Zafar Husain	Banker/U.P	Dissolution	21.2.17	4.9.17	193
62	Samiullah V. Anwarul Hasan	Champaran(W)	Waqf and Rights etc.	21.2.17	4.11.17	269
63	Tarana Anjum V. Jamal Ahmad	Bhagalpur	Dissolution	22.2.17	1.9.17	189

64	Nazia Alias Bebi V. M.Zafir	Buxar	"	22.2.17	9.7.17	137
65	M. Ghufran V. Nasrain	Gaya	Khula	23.2.17	23.2.17	0
66	Noor Jahan V. M. Jabir Husain	Nalanda	Dissolution	23.2.17	2.9.17	189
67	M. Dayamuddin V. Afrin Naz	Patna		26.2.17	25.4.17	59
68	M. Mahtab Alam V. Hasan Ara	Nalanda		26.2.17	3.5.17	67
69	Quraisha V. Akbar Ali	U.P/U.P	Dissolution	28.2.17	6.5.17	426
70	Sahraz Bano V. M. Ashique	Darbhanga	"	28.2.17	1.2.19	693
71	Abdul Jabbar and Others V. Wasiuddin	Chatra	Rights	28.2.17	5.7.18	497
72	Nikhat Sultana V. M. Sirajuddin	Patna	Appeal	3.3.17	19.7.17	136
73	Perveen V. Jamshed	Muzaffarpur	Dissolution	4.3.17	20.10.17	232
74	Jahan Ara V. Junaid	Banka	"	4.3.17	19.2.18	345
75	Shaheedan Bibi V. M. Shamim	Bhabua	"	4.3.17	1.9.17	117
76	Naz Shahin V. Ziaul Hoda	Dhanbad	Dissolution	4.3.17	9.3.18	365
77	Yasmin Perveen V. Abid Husain	Ranchi	Dissolution	6.3.17	17.3.17	11
78	M. Anvar V. Rukhsana	Patna	"	6.3.17	24.8.17	168
79	M. Islam V. Shakeela	Ranchi	Dissolution	6.3.17	17.3.17	11
80	Qamar Nisa V. Hamida	Saran	Dissolution	6.3.17	9.4.18	393
81	Nafisa V. Aftab Alam	Rohtas	"	11.3.17	10.6.18	449

82	Noor Ayesha V. M. Ishaque	Vaishali	Good Treatment	11.3.17	13.9.17	182
83	Rabiya V. M. Muneeruddin	Bhojpur	Dissolution	11.3.17	16.7.17	125
84	M. Manzoor Alam V. Bibi Rizwana	Bhagalpur	Dissolution	11.3.17	17.11.17	246
85	Wasim Akhtar V. M. Ali	Aurangabad	Property dispute	15.3.17	23.3.18	368
86	Nisar Ahmad V. Neyaz Ahmad	Dhanbad	"	15.3.17	23.3.18	368
87	Noor Saba Perveen V. A.Z alias Bablu	Samastipur	Dissolution	18.3.17	4.11.18	586
88	M. Qais V. Shahnaz	Buxar	Dissolution	19.3.17	23.7.17	124
89	Hasne Ara V. M. Firoz	Patna	Appeal	19.3.17	6.9.17	167
90	Jahan Ara V. M. Munna Alam	Jahanabad	Dissolution	21.3.17	27.11.17	246
91	Husn Ara V. M. Shabbir	Vaishali	"	22.3.17	15.12.17	263
92	Mst. Shahzadi V. Shahid	Patna	"	22.3.17	1.4.18	369
93	M. Ashraf V. Rubi	Patna	"	22.3.17	19.5.17	57
94	Shakila V. M. Kalam Shah	Jahanabad	Confirm-ation of divorce and Mahardi	22.3.17	19.5.17	57
95	Shakila Bano V. M. Arif	U.P/U.P	Dissolution	22.3.17	8.11.18	586
96	Wazif V. Khursheed	Ranchi	Confirm-ation of divorce	25.3.17	8.11.18	583

97	Sakina V. M. Mushtaque	Pakur	Dissolution	25.3.17	30.2.18	335
98	Bibi Talat V. M. Luqman	Bhagalpur	"	25.3.17	28.9.17	183
99	Bibi Amina V. Rizwan Ahmad	U.P/U.P	Dissolution	27.3.17	18.8.17	141
100	Zulekha Ismat V. M. Salahuddin	Bokaro	"	27.3.17	27.7.17	120
101	Madina V. Abdul Jabbar	Bhojpur	"	28.3.17	23.5.17	55
102	Yasmin Tara V. M. Zubair	Vaishali	"	28.3.17	23.5.17	55
103.	Salahuddin V. Ayesha	Dhanbad	"	1.4.17	18.5.17	47
104	Shakil V. M. Shakir	Sheo	"	1.4.17	18.8.17	197
105	Nasreen Kausar V. Shahanshah Alam	U.P/U.P	"	2.4.17	4.11.18	572
106	Gulshan Ara V. M. S. Mansuri	Banka	"	2.4.17	14.8.18	492
107	Bibi Aliqa V. M. Ghayasuddin	Saharsa	"	3.4.17	20.9.17	167
108	Raunaq Jahan V. Asghar Shah	Jahanabad	"	3.4.17	29.7.17	116
109	Sarwari V. Kalimuddin	Patna	Dissolution	4.4.17	4.4.17	0
110	Nusrat Perveen V. M. Ghani	U.P	"	4.4.17	13.11.17	219
111	Musarrat alias Guria V. M. Z. Jang	Dhanbad	"	5.4.17	22.5.18	407
112	Perveen V. Nisar Ahmad	Patna	"	5.4.17	9.9.17	154
113	Pervez Alam V. Akhlari Bano	Patna	"	6.4.17	6.2.18	300
114	Shakila V. Faqir Mohd.	Vaishali	"	6.4.17	19.12.17	253

115	Shabistan Bazme Ara V. M.R. Haider alias	Nalanda	”	6.4.17	30.5.17	54
116	Nikhat V. M. Iqbal Ahmad	Nawada	”	9.4.17	13.11.17	214
117	M. Mushtaque V. Sabira	Vaishali	Dissolution	9.4.17	16.10.17	187
118	M. Akbar V. Saira	Nalanda		9.4.17	8.7.17	89
119	Raisa V. M. Azad Ali	Patna	Dissolution	10.4.17	15.10.17	185
120	Shakila alia Munni V. Shahid Rai	Hazari Bagh	”	12.4.17	18.12.17	246
121	Suhail Akhtar V. Ishrat Jahan	Patna		12.4.17	12.9.17	150
122	Abdul Kabir V. Narisa	Patna		13.4.17	19.8.17	126
123	Salma V. Akhtar Husain	Patna	Dissolution	13.4.17	20.11.17	217
124	Talat Firdaus V. M. Pervez Alam	Patna	”	15.4.17	13.11.17	208
125	Nasiba V. Akhtar	Rohtas	”	15.4.17	19.12.17	244
126	Fatima V. Sharif Ahmad	U.P/M.P	Dissolution	17.4.17	18.12.17	241
127	M. Shamim V. Razia	Patna		17.4.17	23.6.17	66
128	Akhtari V. M. Mustafa Sabri	Gaya	Confirm-ation of divorce etc.	19.4.17	2.2.18	283
129	M. Ismail V. Farhat	Jahanabad		19.4.17	22.6.17	63
130	Maimun Nisa V. Ali Imam	Gaya	Dissolution	22.4.17	4.12.17	236
131	Mukarrama Bibi V. Afroz	Gaya	”	22.4.17	4.9.17	132
132	Shakila V. M. Kaleem	Hazari Bagh	”	24.4.17	17.11.17	203

133	Najma Bano V. Manzoor Husain	Rajasthan/ Rajasthan	"	24.4.17	19.2.18	295
134	Mahrun Nisa V. M. Shamim	Nalanda	"	25.4.17	19.2.18	198
135	M.Jahangir V. Hasiba			26.4.17	19.2.18	233
136	Ishrat Jahan V. M.Mujib	Sheohar	Dissolution	26.4.17	2.12.17	18
137	Musarrat Perveen V. M. Jasmuddin	Patna	G. Treatment	29.4.17	13.11.17	194
138	Reshma Perveen V. Alimuddin	Ranchi	Maintenance	29.4.17	23.12.17	236
139	Zubaida V. M. Asghar	Vaishali	Dissolution	1.5.17	19.12.17	228
140	Shamina V. M. Shakeel	Palamu	"	2.5.17	22.7.18	440
141	Nausheba V. M. Faiyaz	Nalanda	"	2.5.17	8.1.19	606
142	Noor Ayesha V. M. Saffu	Jahanabad	"	5.5.17	8.1.19	75
143	Naushaba V. Aish Ali	Nalanda	"	5.5.17	8.2.18	273
144	Tahrun Nisa V. Roza Din Hashmi	Rohtas	Dissolution	7.5.17	19.12.17	222
145	Shahnaz Perveen V. M.Naqi Imam	Patna	"	8.5.17	20.7.17	72
146	Zurat Kausar V. M.Layeeque	Nalanda	"	9.5.17	26.11.17	227
147	Anjuman Islahul Muslimin in Re	Hazari Bagh	Permission for Mosque	9.5.17	4.5.18	355
148	Gulshan Ara V. Gulab Husain	Calcutta/ Calcutta	Dissolution	11.5.17	1.4.18	320
149	Hanifa V. M.Shahabuddin	Dhanbad	"	11.5.17	29.12.17	228
150	M. Shamim V. Ishrat Jahan	Patna		14.5.17	28.10.17	159

151	Ghulam Mohd. V. Ayesha Haque	Delhi	Appeal	15.5.17	12.6.18	37
152	Masuma V. M.Hamid	Vaishali	Dissolution	15.5.17	12.6.18	387
153	Nazira V. M. Aqil	Patna	"	15.5.17	21.7.17	66
154	Sakura V. M. Ashraf	Aurangabad	"	17.5.17	15.6.18	388
155	Maryam V. Lal Mohd.	Aurangabad	"	17.5.17	2.7.18	405
156	Nafis Ahd. V. Farhat Y. Deasy	Gaya		17.5.18	20.3.19	513
157	Bibi Jamiya V. M. Ismail	Dumka	Dissolution	21.5.17	10.1.18	439
158	Ehsan Ahmad V. Mahjabin	Patna		21.5.17	21.3.18	510
159	M. Habib V. Azhari	Bhojpur		21.5.17	5.8.17	75
160	Maj Jabin Ara V. Shamshad Ahmad	Nalanda	Dissolution	21.5.17	30.7.17	69
161	Saira V. Zakir Husain	Rohtas/Haryana	"	24.5.17	23.6.18	389
162	Zainul Abidin V. Talat Bano	Gaya		24.5.17	30.7.17	66
163	Qasiran V. Hakimuddin	Rohtas	Dissolution	25.5.17	4.12.17	189
164	M. Naushad V. Shahnaz	Vaishali		25.5.17	18.12.17	203
165	Shabana V. Qutbuddin	Patna	G.Treatm.	30.5.17	18.10.17	138
166	Rahima V. M. Nisar Ahmad	Darbhanga	Dissolution	30.5.17	23.3.18	293
167	Shafiqa V. M. Shujauddin	Patna	"	1.6.17	2.2.18	240
168	Farzana V. A. Majid Saqii	Darbhanga	"	3.6.17	10.1.18	217

S.No.	Name	Place	Matter	Started	Decided	Days
171	Rukhsana V. Alauddin	Dhanbad	"	6.6.17	19.12.17	193
172	Shahjahan V. Ali Mohd.	U.P/Bhabua	"	7.6.17	1.3.18	264
173	Sima Faizi V. Khursheed A. Gauhar	Patna	Khula	14.6.17	19.12.17	185
174	Shahnaz Bano V. Abrar Hussain Gulfam alias Raju	Patna	Dissolution	14.6.17	15.10.17	124
175	M. Meraj Alam V. Rizwana	Patna		15.6.17	9.3.18	264
176	Shabnum Bano V. Salahuddin	Ka	Dissolution	17.6.17	5.5.18	318
177	M. Nizamuddin V. Sabiha	Nalanda		17.6.17	27.6.18	220
178	Zinat Perveen V. Sham Sher Ali	Samastipur	Dissolution	17.6.17	10.11.17	143
179	Akhtari V. Vaseem Ahd.	Rohtas	"	21.6.17	16.2.18	235
180	Akhtari V. Naushad Alam	Bhojpur	"	21.6.17	26.2.18	424
181	Zubaida V. Karu Mian and Others	Patna	Maintenance	23.6.17	4.4.18	281
182	Perveen V. Ekram	Patna	Dissolution + Return of Goods	23.6.17	18.2.18	415
183	Zinal Kausar V. Masood Alam	Patna	"	24.6.17	29.8.18	605
184	Ashraful Hoda V. Zubair	Patna	Dissolution	29.6.17	6.11.17	127
185	Ayesha V. M.Sharf Husain and Others	Nawada	Dower + Goods of Dowry	1.7.17	2.12.17	154
186	Musarrat Perveen V. M. Mumtaz	Gaya	Dissolution	2.7.17	24.7.18	382

S.No.	Name	Place	Matter	Started	Decided	Days
187	Sakina alias Soni V. M.Nazir	Patna	"	4.7.17	23.9.18	619
188	Ashrafun Nisa V. N.Fakhruddin	Patna	Khula	4.7.17	5.7.17	01
189	Zayeem Ahd. V. Mumtaz Begum	Patna	G.Treatment	5.7.17	6.5.18	300
190	Mehrun Nisa V. M. Munir	Patna	Dissolution	7.7.17	7.8.18	390
191	Rubina V. M.Raees	U.P./U.P.	"	8.7.17	28.2.18	241
192	Darakhshan Anjum V. S. Alam	Nalanda	"	8.7.17	28.2.18	182
193	Bebi V. Amjad	Dhanbad	"	9.7.17	7.3.18	238
194	Roshan Ara V. M. Khursheed	Nalanda	"	9.7.17	2.3.18	255
195	Zenat Jahan V. Jaleel Bazidpuri	Shekhpura/ Mahaihra	Dissolution	12.7.17	7.12.17	145
196	Adeeb Haider	Patna	Certificate of Faith	13.7.17	16.7.17	03
197	Sanjeeda V. M. Sami	Gaya	Dissolution	14.7.17	25.8.17	41
198	Saifuddin V. Shamim Ahmad	Hazari Bagh	Implementation Agreement	16.7.17	25.8.17	39
199	Ahmad Ali V. Mushtari	Jahanabad		18.7.17	19.8.17	31
200	Ramiza V. M. Aneesa	Aurangabad	Dissolution	19.7.17	5.8.18	376
201	Farzana V. Jahangir Ahd.	Patna	"	25.7.17	5.5.18	290
202	M. Shahruddin V. Naseema	Gaya		25.7.17	1.12.17	126
203	Wakeel Ahmad V. Farhat Jahan	Patna		26.7.17	3.3.18	397

S.No.	Name	Place	Matter	Started	Decided	Days
204	Rizwana Perveen V. M.Kaleem	Dhanbad	Dissolution	26.7.17	6.5.18	279
205	M.Alaur Rehman V. Shamshul Haque	Palamu	In Defence of Anjuman's Decision	29.7.17	3.7.17	04
206	Shabnam Bano V. Salahuddin	Bhabua	Dissolution	29.7.17	27.1.18	358
207	Perveen Bano V. Shahbeen	Patna	"	30.7.17	21.9.17	51
208	Amina V. Qayamuddin	Patna	"	30.7.17	2.12.17	122
209	Qudrat Bano V. M.Ehtesham Alam	Patna	"	2.8.17	12.7.18	400
210	M. Shamsul Huda V. Imam Bandi	Ranchi	G. Treatment	4.8.17	24.7.18	380
211	M. Shamsul Huda V. Imam Bandi	Ranchi	Ligitation Cost	4.8.17	20.3.18	380
212	M. Jahangir V. Shamina	Patna		4.8.17	20.3.18	436
213	Musarrat V. Sajjad Ali	Chapra	Dissolution	6.4.17	21.12.18	735
214	Mushtari Khatoon V. M. Ekram	Nawada	"	6.4.17	24.7.18	378
215	M. Khursheed V. Roshan Ara	Patna	"	6.8.17	4.12.17	480
216	M. Dildar Husain V. M. Husain	Rohtas	Inheritance	7.8.17	19.8.17	12
217	Khursheed Alam V. Shabnam	Patna		9.8.17	10.2.18	360
218	M. Naseemuddin V. Taishan Nisa	Bhojpur		9.8.17	28.11.17	109
219	M. Ozair Ahmad V. M. Javed	Champaran	Personal matter	10.8.17	16.12.18	486
220	M. Mumtaz V. Salma	Patna		17.8.17	8.3.18	210
221	Sahrun Nisa V. Munis Ahmad	Gaya	Dissolution	17.8.17	11.5.18	264

S.No.	Name	Place	Matter	Started	Decided	Days
222	Uzra Bano V. Moizuddin	Dhanbad	"	17.8.17	15.3.18	208
223	Farzana V. Sadruddin	Gaya	"	18.7.17	25.2.19	547
224	Qaisar Sultana V. M.Nasim	Patna	"	18.7.17	21.3.18	213
225	M. Mobin V. Shahjahan	Bhojpur		18.7.17	14.1.18	154
226	Noor Jahan V. M. Kausar Imam	Nalanda	Dissolution	20.7.17	24.7.18	330
227	Hajra V. Misrafil	Burar/U.P.	"	20.7.17	2.6.18	282
228	Shahzadi V. Tahseen	Nawada	Dissolution	20.7.17	1.4.18	219
229	Ajmeri V. Asghar Ali	Samastipur	"	23.8.17	15.10.17	52
230	Roohi V. M. Faiyaz Alam	Patna	"	23.8.17	9.11.17	88
231	Mahmood Ghaznavi V. Husna	Patna		25.8.17	16.2.18	180
232	Mahjabin V. Ehsan Ahmad	Patna	Dissolution	28.8.17	21.3.18	203
233	M. Rahman V. Saira	Patna		28.8.17	19.11.17	81
234	Shabana Tabassum V. Aftab Akhtar	Patna	Dissolution	28.8.17	11.2.18	163
235	Izhar Ahmad V. Mubina	Madhubani		1.9.17	13.4.18	222
236	Bibishama Bano V. M. Khurram	Bhagalpur/USA	Dissolution	1.9.18	29.6.18	270
237	Noor jahan Bano V. M.M. Rehman	Jahanabad	"	4.9.17	20.3.18	196
238	Sajida V. Abdul Hai	Bhojpur	"	4.9.17	21.4.18	227
239	Hasiba Bano V. M. Saghir	Nalanda	"	4.9.17	24.7.18	320

S.No.	Name	Place	Matter	Started	Decided	Days
240	Noor Ayesha V. Seraj Ahmad	Patna	"	4.9.17	6.5.18	242
241	Noor Jehan V. M. Matin	Gaya	"	12.9.17	11.2.18	149
242	Bibi Shahnaz V. M. Farhan	Sahetganj	Appeal	13.9.17	15.10.17	32
243	Madina V. M. Salauddin	Saran	Dissolution	15.7.17	5.5.18	230
244	Hasina V. M. Irfan	Patna	"	23.9.17	22.5.18	239
245	M. Ghufran V. Chamkela	Sitamarhi		10.10.17	10.8.18	300
246	Noor Jahan V. Wasim Shamshi	Gaya	Khula	11.10.17	11.10.17	0
247	Shaida V. Anwar Ali	U.P./U.P.	Dissolution	12.10.17	23.3.18	161
248	Razia Ashraf V. Attar Hussain	Shaikhpura	Confirmation of Divorce	12.10.17	11.3.18	149
249	Tabassum Ara alias Ladli V. Pervez Tajdar	Bangladesh/ Bihar	Dissolution	12.10.17	22.9.18	340
250	Asghari V. M. Sabir	Gaya	"	15.10.17	8.5.18	210
251	Shah Mohd. V. M. Zahurul Haque	Sitamarhi	Property of Waqf	17.10.17	22.9.18	335
252	Zarina Khatoon V. M. Qurban	Nalanda		18.10.17	10.6.18	232
253	Najma V. Gal Sanorar	Baxar	Dissolution	18.10.17	13.3.18	145
254	Saghira V. M. Razi Ahmad	Patna	"	22.10.17	6.5.18	194
255	Khursheed V. Nisar Ahmad	Nalanda	"	22.10.17	21.10.18	299
256	Bibi Tabassum V. M. Nayyar Azam	Nalanda	"	25.10.17	27.1.18	94

S.No.	Name	Place	Matter	Started	Deaded	Days
257	Shakila Perveen V. Naim Akhtar	W.B./Gridih	"	25.10.17	9.4.18	164
258	Noor Jahan V. M. Bundu	Gaya/U.P.	"	26.10.17	25.11.18	389
259	Nasima Perveen V. M. Shahboob Alam	Patna	"	26.10.17	13.5.19	557
260	Secretary Anjuman Fakhul Muslimin	Patna	Permission for School	26.10.17	6.11.17	08
261	M. Wasi Imam V. Shahida Fatima	Patna		29.10.17	16.1.18	103
262	Noorul Hasan V. Saleha	Kaimur	"	29.10.17	29.12.18	420
263	Shabina V. M. Shakeel	Patna	Dissolution	29.10.17	24.7.18	265
264	Ajmeri V. Shamim	Begusarai	Dissolution	29.10.17	3.7.18	244
265	Ghazala Perveen V. Abdur Rehman	Patna	Khula	29.10.17	13.11.17	14
266	M. Qasim V. Jamila	Chapra		1.11.17	30.2.18	299
267	Shahnaz V. M. Firoz	Pakur	Dissolution	5.11.17	27.2.18	292
268	Shahnaz V. M. Sabir	W.B/Bihar	Khula	6.11.17	6.11.17	0
269	Sitara Bibi V. M. Yaqoob	U.P./U.P.	Dissolution	18.11.17	7.10.18	330
270	Saira V. M. Mustafa	Patna	"	9.11.17	19.5.18	190
271	Hasina V. M. Adbul Majid	Bhojpur/U.P.	"	12.11.17	17.11.18	365
272	Syida V. M. Mushtaque Alam	Jahanabad	"	12.11.17	2.4.18	138
273	Rumi Bano V. M. Abid Husain	Patna	Dissolution	14.11.17	17.5.18	185
274	Amibun Nisa V. Shamim	Gaya	"	15.11.17	10.6.18	205

S.No.	Name	Place	Matter	Started	Decided	Days
275	Najma V. M. Reyaz Ahmad	Patna	"	15.11.17	26.2.19	401
276	M. Shahnawaz V. Nulofar Nahid	Bhojpur		17.11.17	27.6.18	220
277	Farhat Bano V. M. Nizamuddin	Gaya/U.P.	Dissolution	17.11.17	11.9.18	300
278	Mahjabin V. M. Jamshed	U.P./Gaya	Confirmation	17.11.17	17.5.18	180
279	Bibi Amina V. M. Afaque Alam	Banka	Dissolution	21.11.17	18.3.17	117
280	M. Qamruddin V. Bibi Zahra	Gaya	"	21.11.17	5.5.18	180
281	Zulekha V. M. Shahid	Buxar	"	23.11.17	27.5.18	184
282	Asif Ali V. Sazina	Patna	"	23.11.17	18.2.18	117
283	Shabnam Perveen V. M. Mukhtar	Patna	Khula	26.11.17	15.7.18	169
284	Farzana V. M. Anwar	Patna	"	26.11.17	2.4.18	126
285	M. Qamruddin V. Farhat Nasreen	Deoghar	Dissolution	27.11.17	7.5.18	160
286	Shabana V. M. Shafi	Patna	Dissolution due to rejection of order	27.11.17	26.12.17	29
287	Farida V. M. Amin	Maghalia	Khula	4.12.17	5.12.17	01
288	Zahirun Nisa V. M. Ashraf	Maghalia	Khula	4.12.17	5.12.17	01
289	Hasbun Nisa V. M. Ilyas	Patna	G. Treatment/ Dissolution	6.12.17	2.4.18	120
290	Khadijatul Kubra Alias Ruhi V. Aftab Alam	Patna	Dissolution	7.12.17	3.7.18	205

S.No.	Name	Place	Matter	Started	Deaded	Days
291	M. Aslam V. Afsana	Patna		21.12.17	16.8.18	235
292	Nargis Bano V. M. Mustafa	U.P./U.P.	Dissolution	21.12.17	21.10.18	300
293	Hina Tabassum V. M. S. Hussain	Gaya	"	21.12.17	10.6.18	169
294	Farzana V. M. Sahazad Alam	Samastipur	"	25.12.17	21.10.18	294
295	Jasmin V. M. Haroon	Sahabganj/ Rajasthan	"	26.12.17	3.8.18	217
296	Zinat Fat 121ima V. Shakir Ahd. Yahya	Darbhanga	"	26.12.17	27.4.18	121
297	M. Pervez V. Nasiruddin	Samastipur	Confirmation of Divorce	28.12.17	5.1.18	17
298	M. N. Haque alias Nazim V. S. Niyazi	Samastipur	Demand of Divorce	29.12.17	30.3.18	451
299	Shakila V. M. Haidar Ali	Dhanbad	Dissolution	29.12.17	12.7.18	193
300	M. Nafil V. Maryam Bibi	Pakaura		29.12.17	4.11.18	305
						59899

Average - 59899/300 =199.66 days per case

* 169	Shaista Bano V. Shijaat Nasir alias Pappu	U.P/ Pakistan	"	4.6.17	19.2.18	255
170	Shahnaz V. Mohd. Alam alias Chhabbu	Jammu	"	6.6.17	18.12.17	192

3. TABLE- C; CASES OF PATNA HIGH COURT (A .I .R. - 1998[1]):

S.No.	NAMES	MATTERS	CASES	STARTED	DISPOSED	DAYS*
1.	**Abhay Prakash V. High Court of Patna**	*Advocacy*	**Direct**	1.1.96	1.1.98	**730**
2.	**Ashok Kumars V. Bihar I.T.C.O Ltd**	*Rights*	**Appeal**	1.1.95	1.1.98	**1095**
3.	**Ashok Kumars V. State**	*Land*	**Appeal**	5.12.89	5.12.98	**3285**
4.	**Avinash Kumars V. State**	*Land*	**Appeal**	1.1.86	1.1.98	**4380**
5.	**Banwarilal A. V. Ramswaroop A.**	*Agreement*	**Appeal**	29.10.90	29.10.98	**2920**
6.	**Bihar. S.E. Co V. Bihar S.F.D Com Ltd.**	*Agreement*	**Appeal**	1.1.78	12.2.98	**7341**
7.	**Bihar S. Tourism D.C. V. R.P. Sharma**	*Arbitration*	**Appeal**	1.7.87	1.7.98	**4015**
8.	**Byendra V. Smt Duleshwaro D.**	*Partnership*	**Appeal**	1.1.97	1.1.98	**365**
9.	**Chandrika S. Add. Member B.of Rev.**	*Land*	**Appeal**	30.3.92	30.3.98	**1095**
10.	**East Bihar R.B.U. Bhagalpur V. State**	*Tax*	**Direct**	19.3.96	19.3.98	**730**
11.	**Ganga Singh College V. B.B. Maonder**	*College Grant*	**Direct**	10.12.93	18.11.97	**1437**
12.	**Gaya Prasad V. Smt. J.D**	*Land*	**Appeal**	1.1.86	20.5.97	**4157**
13.	**I.U.M.C. V. Union of India**	*Transfer of Gov.*	**Direct**	1.1.98	4.8.98	**215**

[1] Where the month was not cleared the date was fixed 1st of January of the known year. Where the date was not clear the date was assumed as first of that month.

*. No of days Consumed.

14.	**Janardan Pandey V. Karoo Pandey**	*Partition*	**Appeal**	1.1.77	24.4.98	7778
15.	**Janki Singh V. Bhagwans**	*Gift*	**Direct**	16.5.77	9.4.98	7324
16.	**Kameshwar C. V. State**	*Land*	**Appeal**	1.1.87	27.11.97	3980
17.	**Lipton India Ltd. V. Bihar S.A.M.B.**	*Land*	**Appeal**	19.4.89	16.5.97	2947
18.	**M. Faizan V. State**	*Society*	**Appeal**	1.1.94	13.5.97	1227
19.	**National Ins. Co. Ltd. V. Shobha D.**	*Compensation*	**Appeal**	21.8.89	17.3.98	3127
20.	**N.T.P.C. V. Surendra P.J.**	*Land*	**Appeal**	15.4.93	24.2.98	1773
21.	**Purushottampur C. Pvt Ltd. V. India**	*Coal mines*	**Appeal**	1.1.78	5.9.97	7192
22.	**Pyrites Phos. & Chem. Ltd. V. State**	*Agreement*	**Direct**	17.1.97	15.5.97	118
23.	**Radha Rajak V. Balmiki D.**	*Recovery of money*	**Appeal**	1.1.71	15.4.98	9959
24.	**Rajiv Ranjan K. V. State**	*Admission*	**Direct**	1.5.97	28.11.97	208
25.	**Ram A.Y. Dr. V. State**	*Service*	**Direct**	23.1.97	3.10.97	283
26.	**Ram D.P. V. State**	*Land*	**Appeal**	1.1.71	8.5.97	9490
27.	**Rameshwar Jute Mill Ltd. V. State**	*Agriculture*	**Appeal**	1.1.86	9.4.98	4478
28.	**Ranchi Tumber Trad. Ass. V. State**	*Forest*	**Direct**	20.10.96	19.8.97	302
29.	**Rukaiya Begum V. Fazlur Rahman**	*Preemption*	**Appeal**	1.1.89	14.5.97	3053
30.	**Sadhna D. V. Bijendra K.**	*Maintenance*	**Appeal**	1.1.95	3.3.98	1156
31.	**Shankar Traders V. State**	*Forest*	**Appeal**	1.1.91	23.4.97	2302

32.	**Shankar Traders V. State of Bihar**	*Forest*	**Appeal**	1.1.92	26.2.98	**2246**
33.	**Shree Kirti V. State**	*Land*	**Appeal**	20.7.82	20.7.98	**5380**
34.	**Shyan K.S. V. State**	*Land*	**Appeal**	1.1.90	16.10.97	**2843**
35.	**State V. Puran C.M.**	*Coal mines*	**Appeal**	24.2.85	24.2.98	**4745**
36.	**State V. R.M.C. Oil & Co. (P) Ltd.**	*Forest*	**Appeal**	11.5.96	11.5.98	**730**
37.	**State Govt. of Bihar V. S.K.Singh**	*Transport*	**Appeal**	1.1.94	1.1.98	**1460**
38.	**Subhadra D. V. State of Bihar**	*Land*	**Appeal**	1.1.86	1.1.98	**730**
39.	**Surjeo P. V. R.B.Prasad**	*Rent*	**Appeal**	1.1.96	1.1.98	**730**
40.	**S.K.Das V. A.K.Das**	*Partition*	**Appeal**	1.1.88	1.1.98	**3650**
41.	**Umesh K.V. V. Chandrika Pd. S.**	*Eviction*	**Appeal**	1.1.98	1.1.98	**0**
42.	**Union of India V. K. Mehto**	*Land*	**Appeal**	5.2.96	5.2.98	**730**
43.	**Smt. Usha K. V. Principal J. F. Court**	*Eviction*	**Appeal**	1.1.86	1.1.98	**4380**
44.	**Vidya Devi V. Gauri Shankar P.S.**	*Land*	**Appeal**	1.1.84	1.1.98	**5110**

GRAND TOTAL **131196**

AVERAGE: 131196/44 = 2981.727 days/case

4. TABLE- D; CASES OF PATNA HIGH COURT (A .I.R - 1999[2]):

S.No.	NAMES	MATTERS	CASES	STARTED	DISPOSED	DAYS*
1.	**A.F.Corp. V. N.K. Surha.**	*Vehicle*	***Appeal***	1.1.95	1.11.99	**1764**
2.	**A.N. Verma V. B.N. Verma.**	*Partition*	***Appeal***	7.5.96	1.1.99	**975**
3.	**A.V. Hindi Dainili V. Bihar Ag**	*Eviction*	***Direct***	5.5.97	1.10.99	**876**
4.	**Bihar Etce Bd. V. Apar Ltd.**	*Agreement*	***Appeal***	1.1.76	1.1.99	**8395**
5.	**Birbal Yadav V. S. Thuku**	*Agreement*	***Appeal***	1.1.91	1.1.99	**2920**
6.	**B.G. Ltd. V. Bihar E.Bd.**	*Electricity*	***Appeal***	1.1.94	1.12.99	**2159**
7.	**B.S.E.B. Patna V. B.S.R.P.Surha**	*Electricity*	***Appeal***	1.1.96	1.11.99	**1034**
8.	**Chunia M. V. Sobha M.**	*Partition*	***Appeal***	1.1.74	1.10.99	**9398**
9.	**Citizen Council V. State**	*Fair*	***Appeal***	10.9.97	1.1.99	**473**
10.	**C. Sinku V. B. Surgh Soy.**	*Election*	***Direct***	24.4.98	1.5.99	**372**
11.	**Deoki P.R. V. Smt. A. D. Poddar**	*Partnership*	***Direct***	1.1.80	1.2.99	**6835**
12.	**D.K. Yadav V. Bihar**	*Vehicle*	***Appeal***	15.12.98	1.11.99	**320**
13.	**Ghulam M. Jafri V. Bihar**	*Waqf*	***Direct***	1.1.96	1.7.99	**8576**
14.	**J. Lal V. L. Devi**	*Eviction*	***Appeal***	1.1.92	1.11.99	**2859**

[2] The cases of March Issue of AIR are not included here.

* No of days consumed

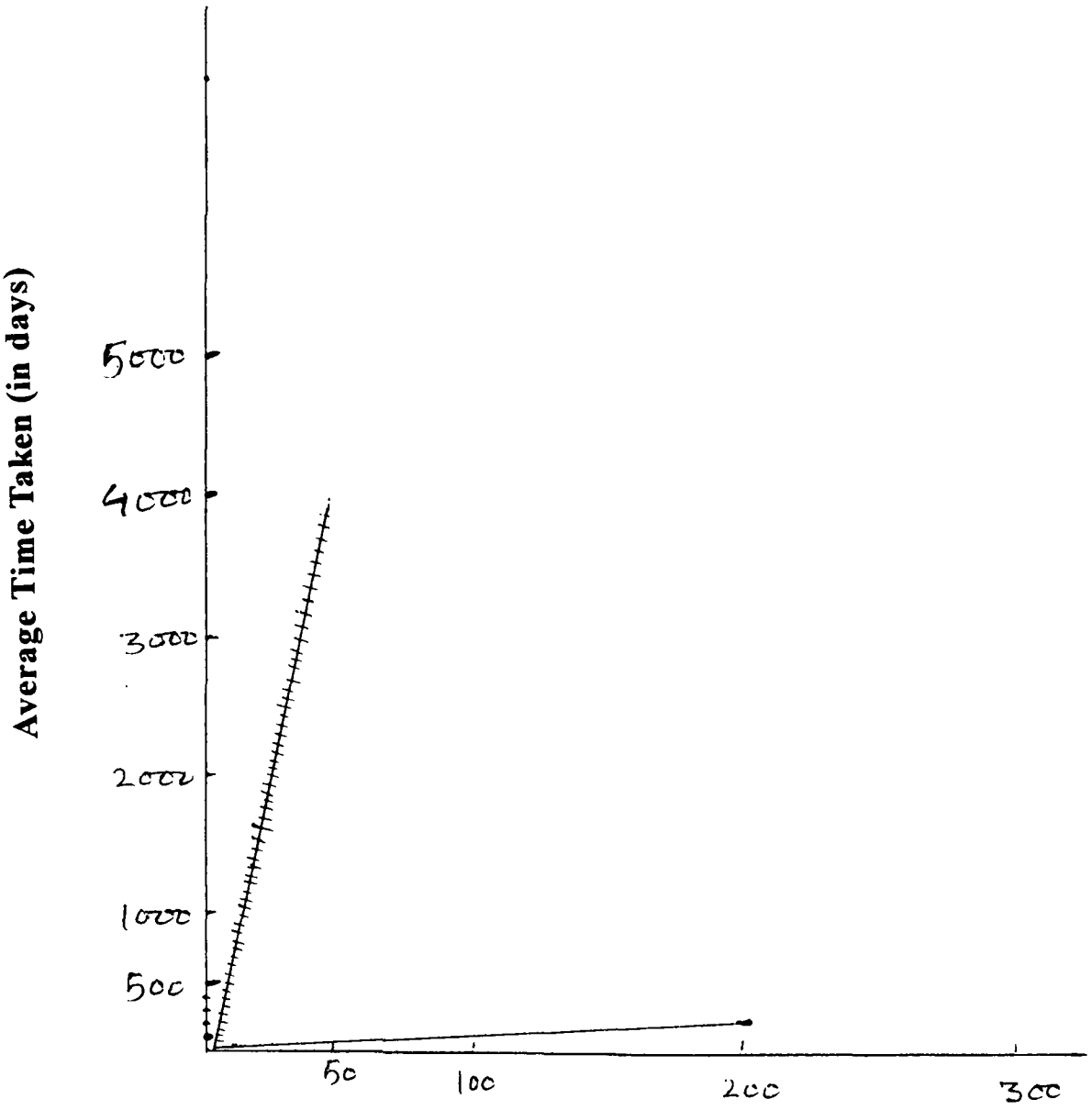
15.	Jamaudan S. V. S. D. Singh	*Election*	***Direct***	24.6.96	1.12.99	1253
16.	A-K. D. Mills V. M.D.B.S.MK.Bd.	*Business*	***Direct***	25.3.95	1.7.99	1558
17.	Kumar A.C.S. V. Scale	*Licence*	***Direct***	31.10.97	1.7.99	608
18.	K.P. Sah V. G. D. Sastri	*Agreement*	***Appeal***	1.1.91	1.7.99	3101
19.	Lawyers Am. Ranch (H.C) V. Bihar	*P.I.L*	***Direct***	1.1.98	1.6.99	881
20.	L.I.C. of India V. K. Singh	*Money Recovery*	***Appeal***	1.1.94	1.6.99	1976
21.	Mehant R.S.Das V. Bihar Reli. T. Bd.	*Trust*	***Appeal***	13.1.93	1.4.99	2632
22.	Mahabir P.B. V. Bihar	*Business*	***Appeal***	1.1.89	1.6.99	3801
23.	Mahant O. Chela V. Bihar	*Land Reform*	***Appeal***	1.1.83	1.1.99	2190
24.	M.Chaudhary V. Bihar	*Agreement*	***Appeal***	1.1.90	1.7.99	3466
25.	Nirmal K.K V. Bihar	*Municipality*	***Appeal***	1.1.75	1.7.99	11941
26.	Nivas Talkies V. State	*Tax*	***Direct***	10.1.94	1.7.99	1997
27.	N.S. Sugar Mills V. India	*Business*	***Direct***	1.1.99	1.11.99	304
28.	Prahlad P.V State	*Finance*	***Appeal***	1.1.92	1.2.99	2586
29.	P.L. Devi V. Bihar	*Land Acq.*	***Appeal***	10.11.87	1.5.99	4187
30.	Pooja Engg. Pvt. Ltd. V. Bihar	*Business*	***Direct***	3.2.99	1.7.99	148
31.	P.P. Singh V. Bihar	*Building*	***Direct***	1.1.98	1.10.99	638
32.	P.K. Singh V. Smt. N. Sinha	*Loaning*	***Appeal***	1.1.81	1.7.99	6751
33.	Raj Kumar P. V. State	*Municipality*	***Appeal***	1.1.88	1.4.99	4105

34.	R. Rishu V. Bihar	*Education*	***Direct***	1.1.98	3.2.99	398
35.	Ranchi Bar Association V. Bihar	*P.I.L*	***Direct***	9.6.98	11.10.99	487
36.	R.N. Sah V. K.P. Singh	*Eviction*	***Appeal***	10.3.72	1.4.99	9876
37.	Rajdeep Singh V. Bihar	*Registration*	***Appeal***	10.7.88	1.4.99	3900
38.	Sawan Lakra V. D. Pahan	*Election*	***Direct***	1.4.95	1.7.99	10140
39.	Suraj Prasad V. Bihar	*M. A. Salary*	***Appeal***	10.3.95	1.4.99	1481
40.	S. J. M. C. R. Das V. India	*Gov. Order*	***Direct***	15.3.99	1.12.99	259
41.	Smt. Narmada Devi V. Bihar	*Municipality*	***Appeal***	20.1.95	1.7.99	1622
42.	Sarbanand P. V. M. P. Singh	*Land*	***Appeal***	14.4.88	1.6.99	4063
43.	Savitri Devi V. A. P. Panday	*Partition*	***Appeal***	1.1.76	1.7.99	8395
44.	S. S. Devi V. R. S. Prashad	*Inhaelance*	***Appeal***	1.1.92	1.1.99	2555
45.	Tara Devi V. K. Gupta	*Partition*	***Appeal***	1.1.84	1.6.99	5626
46.	Tata I. S. Cay Ltd. V. Bihar	*Electricity*	***Direct***	15.1.91	1.11.99	3309
47.	Tata Engg. & I. C. Ltd. V. Bihar	*Tax*	***Direct***	1.1.95	1.4.99	1550
48.	Tripurari M. V. Most Rajpati D.	*Partition*	***Appeal***	1.1.81	1.2.99	6601
49.	W. P. Ltd. V. Swan Pharmaceuticals	*Trade*	***Appeal***	1.1.97	1.5.99	850

GRAND TOTAL 161718

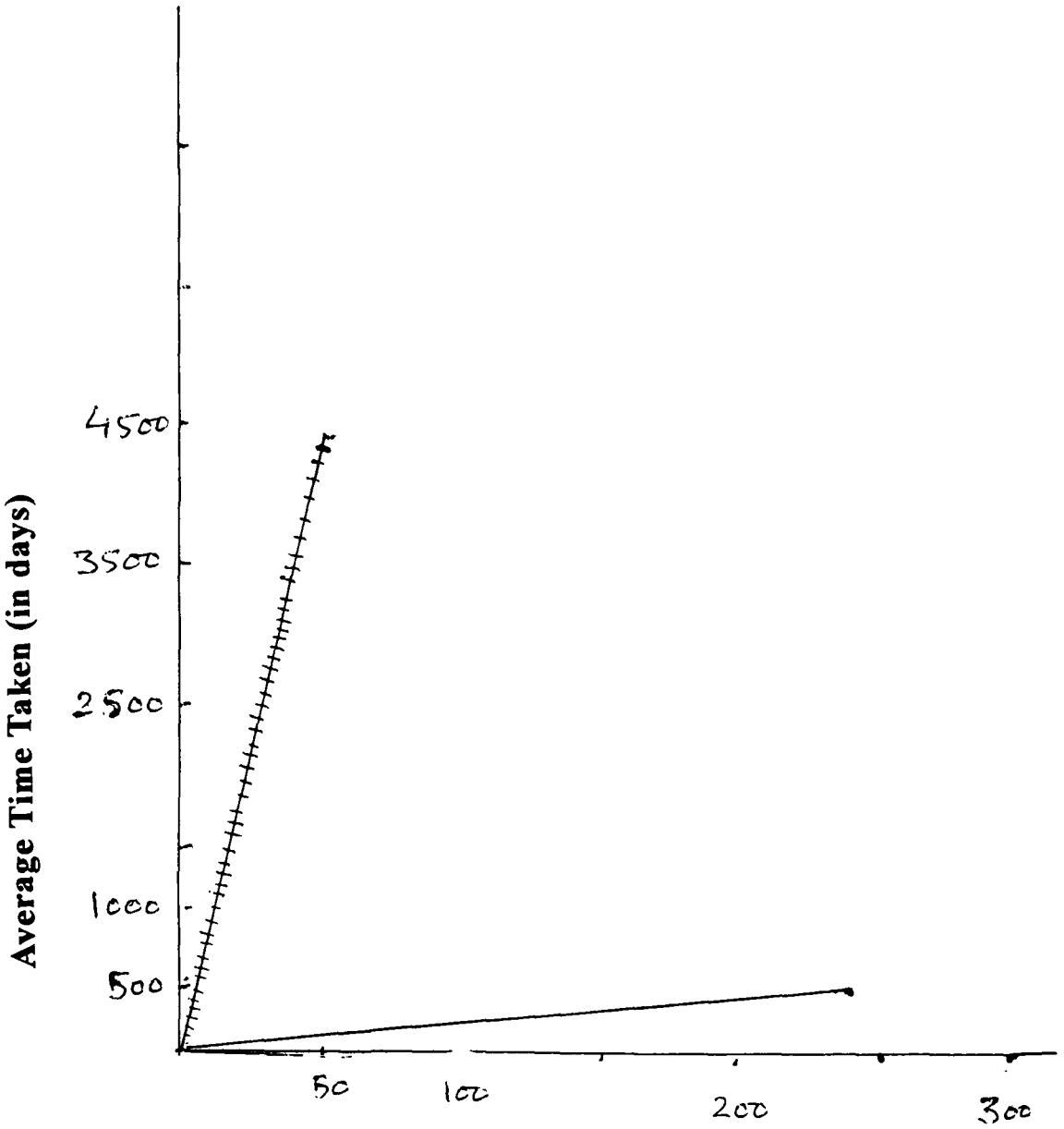
AVERAGE : 161718/49 = 3900 days/case

Graph Showing Time Consumed in the Resolution of the Cases in 1998 by the Patna High Court and Imarate Sharia



Number of Cases Reported in AIR, Patna Section (indicated as ++++) and Imarate Sharia (indicated as ——)

Graph Showing Time Consumed in the Resolution of the Cases in 1999 by the Patna High Court and Imarate Sharia



Number of Cases Reported in AIR, Patna Section (indicated as ++++++) and Imarate Sharia (indicated as ——)

5. COMPARATIVE STUDY:

i). TIME :

The average time taken by Imarate Sharia is 211 days. However the average time taken by the Patna High Court is 3069 days.In this way the time taken by Imarate Sharia for one case is 14.542 times less than Patna High Court. Thus in comparison to the traditional legal system the alternative is less time taking. This thing is clearer from the chart of the cases of district forum where the average time taken per case was very less [3].

ii). COST :

As it has been seen that the court fee is taken for the litigants is not only enough to meet the judicial expenses but it is a good source of revenue of the State.[4] The fee of the advocates is too much. Sometimes cases are taken on contract basis in which a considerable amount is given to the advocates. In lower courts the matter is delayed deliberately so that at every date of hearing the fee of the advocate be collected from the poor litigant. It is so terrible that I have heard myself the person who have made will to their descendents not to go to the court. On the other hand the services of Imarate Sharia is free. It says that it is the right of the person to take justice free of cost. Imarat charges only 25 rupees for postage and 40 rupees for the copies of the judgments. The traveling charges to the poor are free as it is very liberal in soli hearing. Thus we see that in the matter of cost the Imarat is far ahead of our expectations.

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[3] Suhail Hamid Siddiqui 'Consumer Forum' unpublished thesis submitted in Bhim Rao Ambedkar University, Agra 2000.

[4] Supra notes chapter 3.

ii). APPEAL :

It is rare that there is appeal against the decision of the Imarat. It is rarest of the rare that any one goes to the civil court against the judgment of the Imarat. However the percentage of appeal against the judgments of the Civil Court is high. Even in the matter of dissolution the parties do not consider the decision of Civil Courts as an Islamic way of dissolution and go to the Qazi for final decree. Thus in the matrimonial matters the final authority is Qazi as the Muslims believe.

iv). COURT'S OBSERVATION:

In *Agha Mohammad Jaffar B. V. Koolsom Beebee*[5] Privy Council held, It would be wrong for the courts on a point of the nature (the right of the widow to inherit) to attempt to put their own construction on the Quran in apposition to the express ruling of commentators of such great antiquity and authority as the *Hedaya* and the *Fatawa Alamgiri.*

Thus the court itself recognizes that it is not easy to reach on appropriate understanding in Islamic law without the help of the scholars.

In *Khoja Hossein Ali* V. *Shahzadee Hazara Begam*[6], Justice Markby in dissenting opinion said "The Muslim law is such scattered that I am ready to adopt any way to do escape myself".

Again in *Mullick Abdul Ghaffoor v. Muleka*[7] the chief justice Garth held -

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[5] A.L.J.R. H.C. 1085

[6] 12 W.R. 1869 also Wilson's Digest p. 490.

"The Islamic law is old and developed in Baghdad. The difference of opinion and its harmony is very difficult. Even to know the factual law and opinion is difficult".

The above instances show that the judges are not fit for the Muslim law. After the judgment of *Mohammad Ahmad Khan V. Shah Bano Begam*[8] where the Holy Quran was wrongly interpreted a research was made by the intellectuals who reached on the conclusion that in a criteria of cases the courts have deviated from the basic law of Muslims. Thus it may be suggested to establish a separate system. Since Imarate Sharia is working well and that may be recognized and upon that footing each state may have similar courts.

The Supreme Court has also accepted the system of Muslim Personal Law to be governed by the community itself. In *Mohd. S. Labhai* V *Mohd. Hanifa* the court held -

"In the absence of a custom or usage to the contrary, the Mahomedan law does not favour the hereditary right of being an Imam, because an Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. This however, is a matter for the entire Muslim community to decide because an Imam is normally chosen under the Mohammadan law by the Muslim community".[9]

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[7] (1884) 10 Calcutta p. 1112

[8] AIR 1985 S.C. 1086

[9] AIR 1976 SC p. 1572.

however, is a matter for the entire Muslim community to decide because an Imam is normally chosen under the Mohammadan law by the Muslim community".[9]

It is rare that there is appeal against the decision of the Imarat. It is rarest of the rear that any one goes to the Civil Court against the judgment of the Qazi of the Imarat. However the percentage of appeal against the judgments of the Civil Court is high. Even in the matter of dissolution the parties do not consider it(Civil Court) Islamic way of dissolution and go to the Qazi for final decree. Thus in the matrimonial matters the final authority is Qazi as the Muslim believe. It is also clear from the judgment of the Civil Court Godda, Bihar.

v). NEED OF QUZA:

The question 'Is the institution of Quza necessary for dissolution of marriage'? the answer, as *Ulema* responded, is yes. There are several cases where the dissolution of marriage was made by the Court but again for the religious decree parties or at least one of them approached the Imarate Sharia. The observation of W.W. Hunter also shows that there is need of institution of Quza for dissolution of marriage. Moreover the Quranic verses:

[9] AIR 1976 SC p. 1572.

أَلَمْ تَرَ إِلَى ٱلَّذِينَ أُوتُوا۟ نَصِيبًا مِّنَ ٱلْكِتَٰبِ يُؤْمِنُونَ بِٱلْجِبْتِ وَٱلطَّٰغُوتِ وَيَقُولُونَ لِلَّذِينَ كَفَرُوا۟ هَٰٓؤُلَآءِ أَهْدَىٰ مِنَ ٱلَّذِينَ ءَامَنُوا۟ سَبِيلًا ﴿٥١﴾

"Hast thou not turned
Thy thought to those
Who declare that they believe
In the revelations
That have come to thee
And to those before thee?
Their (real) wish to
To resort together for judgment
(In their disputes)
To the Evil (Taghut)
Though they were ordered
To reject him....."[10]

Even the verses of the Quran particularly S.4 A. 139 to 141; S 9 A. 12 and 23 guides further in this direction.

Not only this but the 2nd caliph of Islam Ht. Umar (Raz.) to whom prophet said that if there was chance of prophet-hood, it was Umar who would have been selected, has also guided us. Once a Muslim and a Jew reached him (Umar). The Jew narrated the story that his Muslim fellow wanted that a

[10] The Holy Quran S. 4 A. 51

matter should have been decided by Kab bin Ashraf, the chieften amongst the Jews. But the Jew preferred to go the prophet Mohammad (SAW). When the matter was decided in favour of Jew by the Prophet, the Muslim fellow said that the matter will be decided again by Umar, Ht. Umar Raz. considering the blunder of instigating a person to go to the Jew for redressal of problems furiated that he took his sword and killed him into pieces. He said that the deceased Muslim fellow was no more Muslims due to above-mentioned sins.

The fiqh book also prohibits the Muslims to put their matter before non-Muslim judges. In *Raddul Mukhtar* it has been written that a non Muslim judge can not solve the matter of a Muslim. Another *fiqh* book, *Bahar-i-Shariat* says that to be a Muslim is the Ist and foremost qualification of a judge. The study made in post *Shahbano* era shows that non-Muslim judges often reach at wrong conclusion while deciding the personal law matter of Muslims. It seems each and every Muslim is under obligation to follow the injunctions of *Shariat* and therefore it is their prime duty to make the Muslims refrained from the courts, particularly in the personal law matters. Thus the question is answered positively.

CHAPTER - 8

FUTURE OF IMARTE SHARIA

اسجھکو بتاتا ہوں تقدیر امم کیا ہے

شمسیر و شاول طاوس ورباب آخر

علامہ اقبال

"Let me say the technique of progress

"It is the endeavour"

Let me say the cause of delcine

"It is feast and feastivity"

CH- 8: FUTURE OF IMARATE SHARIA IN INDIA

1.INTRODUCTION:

Keeping in view of the activities of Imarate Sharia, one has to look into its bright future. But there is no rapport between Courts and Imarat, so its legitimacy may be at stake. It is a social organisation. It works to assist the Court and Government as a non governmental organisation (NGO) but still it is to be considered as defecto court and may be described parallel to the state organisation. The moment it receives recognition form the Parliament or from the Assembly it will be defacto as well. However, till such recognition is granted by the above Courts and bodies,its verdict should have the recommendatory and persuasive value before the Courts while deciding the cases before them. Any way as we know that the function of any organisation makes that alive and popular. In order to see the future of Imarat let me discuss its functioning and achievements. The activities of Imarat may be discussed under the following heads.

2.ACTIVITIES OF IMARATE SHARIA:

(1).SOCIAL WORK:

I) WORK IN RIOT AFFECTED AREAS

II) WORK IN FLOOD AFFECTED AREAS

III) WORK IN EARTHQUAKE AFFECTED AREAS

IV) WORK FOR WIDOWS

V) ESTABLISHMENT OF HOSPITALS AND ASSISTANCE TO THE PATIENTS.

(2).WORK FOR MUSLIMS

I) PROTECTION OF RELIGIOUS BELIEVES (*IMAN*)

II) PROTECTION FROM CONVERSION

III) CAMPAIGN AGAINST DRUG ADDICTION AND ALCOHOL

IV) CAMPAIGN AGAINST *TILAK*

V) PROPAGATION OF ISLAM

VI) CONSTRUCTION OF MOSQUES.

(3).WORK IN THE FIELD OF EDUCATION

(4).POLITICAL ACTIVITIES

(5).WORK IN THE LEGAL FIELD

(6).INTERNATIONAL ACTIVITIES

(7).PUBLIC OPINION REGARDING IMARATE SHARIA

1. SOCIAL WORK:

(I) WORK IN RIOT AFFECTED AREA:

In the riots of Belabilaspur, Sugauli, Chatia and Rafla etc. Imarate Sharia sent its workers and helped the riot affect Muslims. The concocted and false cases, against the persons, were fought by Imarat. In this way Muslims regained the confidence in that area[1].

In Betia in 1927 there was preplanned riot. The armed miscreants entered in an area of Muslims and looted hundreds of shops and houses. Some shops were torched after looting and 12 persons were killed and hundreds grievously hearted. A. M. Sajjad himself reached there and remained for 6 months. The cases were fought by Imarat and 15 miscreants were punished for 4 to 10 years imprisonment. Muslims were awarded 50 thousand rupees as compensation, which was taken from miscreants. Due to this bold act no miscreant could dare to involve in the riot for a long time[2].

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[1] Mohd. Zafrudding Miftahi 'Imarate Sharia Dini Jiddo Jihad Ka Roshan Bab', (Patna: Imarate Sharia Phulwari 1974) p. 206.

[2] Ibid. p. 207.

miscreants. Due to this bold act no miscreant could dare to involve in the riot for a long time[2]

In Samarwara of Muzaffarpur one Muslim was killed and lacs of properties worth lacs of rupees of Muslims were looted. Imarat assisted in the riot affect village and perusal of cases were made by Imarat[3].

In 1946 there was worst scene of riot in Bihar. Nearly 40 thousands Muslims were killed in that riot. Imarate Sharia invited several leading personalities of both the communities including M.K. Gandhi and assisted the affected assistance and persons for their rehabilitation[4].

In Darbhanga there was riot at the occasion of *Idul Azha.* Imarat sent its assistance in time and helped the affected persons.[5]

In 1937 there were several riots during congress ministry. *Imarat*e Sharia prepared a detailed report and provided legal and monetary assistance to the affected persons. For this, Naya Gaon of Muzaffarpur and Gaya may be cited[6].

After the independence there were series of communal riots all over India. Sita Marhi, Akhla Ranchi, Basand, Sursand, Calcutta, Raurkela, Jamshedpur. Ahmadabad, Bhinri, Tinu Ghat. Hazaribagh, Awapur, Kharayan,Pathra, and several other cities and places were affected. The Imarat assisted them financially and legally.

Thus we wee that Imarat has played a dominant role in ameliorating and rehabilitation of the people affected by the man made. But after independence there is no such type of activity. Despite the fact that one, who will do this type of social service, will be having bright future.

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[2] Ibid. p. 207.
[3] Ibid.
[4] Ibid. p. 223
[5] Ibid. p. 207
[6] Ibid. p. 225

(II) WORK IN FLOOD AFFECTED AREAS:

Imarte Sharia provides assistance to the flood affected people. In Purnea in 1987 there was unprecedented flood in the Gangas in which thousand of villages of that area were inundated. The Imarat sent its assistance in Orissa where there was typhoon and natural disaster in at least 15 districts in 1999. The Imarat sent its assistance with their men to distribute that properly.

Thus these are the works which will provide the bright future to the Imarat.

(III) WORK IN EARTH QUAKE AFFECTED AREAS:

In 1934[7] there was major earthquake in Bihar in which districts Munger, Darbhanga, Muzaffarpur, Champaran and Saran were worstly affected. A. M Sajjad himself along with others reached there and assisted them. More than one lac rupees were distributed to the affected people. Imarte Sharia proposed to assist each and every person by dividing the village or town in units. One unit was responsible to build the houses of other unit and in this way, without cost, rehab-litation programme was successfully completed.

There were several earthquakes in the country between 1934 and 1974, but the book of Miftahi that is an authentic work on the subject does not contain the detail of the assistance provided by Imarate Sharia. Rather it is the only published material regarding the acheivements of Imarate Sharia. Any way there is a chart in the corridoor of Imarate Sharia that it has helped the earthquake affected persons. Thus in the earthquakes of Darbhanga (1987) to Hilly districts of U.P. in 1999, Maharashtra (Usmanabad & Latur) 1994, it has assisted the persons.

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[7] Miftahi pp. 212-213

In this way the Imarate Sharia fulfills the work of an Imarat and this will certainly provide better future to it.

(IV) WORK FOR WIDOWS:

In India there was tradition that widows should not marry. Muslims were also affected by this tradition and particularly Muslims of Bihar and Orissa were following this tradition. Imarate Sharia started a crusade against this and mass contact was made. In this way the evil tradition was rooted out[8].

Naturally one who does this type of social welfare work is praise worthy and in future, it will be remembered happily.

2. WORK FOR MUSLIMS:

(I) PROTECTION OF RELIGIOUS BELIEF:

Before the establishment of Imarate Sharia in 1921 the religious belief of Muslims was shaken due to lack of knowledge. Imarate Sharia declared a crusade against this and started teaching by mass contact. Nearly twelve thousands villages, towns and cities were targeted and 29137 persons swore not to leave *salat* 6853 persons left the dualistic believes, 6508 person who were keeping Idols in their houses and keeping top *churki*[9] resolved to leave this traditions.

In 1926 onwards in Champaran and Gorakhpur Imarat concentrated upon milkmen *Gaddis* . It sent its workers and their names like Mahadev, Rambilas and Shiva Rati etc and women Bhagminia, Sita, Daropadi etc were changed with Muslim traditional names in Arabic and Persian[10]. In this way the Imarat has worked as custodian of Muslim faith and belief.

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[8] (1). Miftahi '*Imarat* Sharia' P 212

[9] Small portion of hair is kept extra large

[10] Miftahi P. 212

(II) PROTECTION FROM CONVERSION:

In 1925 *Shuddhi Sangathan* movement was started. This was the time when *khilafat* movement was going on. Since Congress was working with *Khilafat* Movement, Muslim leaders were avoiding to highlight this point in order to consolidate and strengthen *Khilafat* Movement. But Imarate Sharia did not care for political gain. It started a mass contact. Muslims of *Bhant* tribe and other Muslims in Chapra and Gorakhpur etc. were helped. In Hazaribagh, where nearly eleven hundred Muslims were converted form Islam were re- entered into Islamic fold by the worker of Imarate Sharia[11]. Imarat actively participates and persuades the converts to re-embrace Islam as it used to do before independence.

Definitely the Muslims will be happy and indebted to Imart. But after independence these activities are lessen. Mr. Miftahi who writes in detail the achievements of Imarat himself says that after independence the activities are lessen due to change in circumstances.

(III) CAMPAIGN AGAINST ALCOHOLIC USE:

In different areas of Bihar, Muslims were addicted to alcoholic use. Imarate Sharia sent its workers who convinced 74,374 Muslims not to use the alcoholic products[12]. The number shows that how effective the campaign was. So there is need to get it continued. The drug addicts are increasing day by day and it may affect the society severely. So Imarat must own this responsibility to make mass campaign against alcoholic use as well as against drug addiction.

(IV) CAMPAIGN AGAINST *TILAK* AND EXTRAVAGENCE IN MARRIAGE:

In India there is tradition of a gift from bride side to bridegroom before the marriage. This system was also started amongst

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[11] Ibid. p. 202
[12] Ibid. 199

Muslims. Imarate Sharia is working tirelessly against this system. Although the response is positive but still this system is continued[13]. There is also tradition of extravagancy in marriage. There is competition amongst the persons for food and other arrangements in relation to marriage. Which is adversely affecting the interest of Muslim Society in general and poor in particular who can not afford such extravagance. Imarate Sharia is fighting against these things. In the course of discussion the Qazis of Imarate Sharia have also observed several times that extravagancy in marriage is not allowed in Islam and it must be checked otherwise the progress of the society will be stagnant. Especially dowry is to be avoided as it is a *Shajare Mamnua*[14].

(V) PROPAGATION OF ISLAM:

In Champaran district,(there was a caste known as) Dom were involved in heinous crimes. The British Government settled them at one place and handed them over to *Salvation Army* for propagating Christianity. Having seen this Imarate Sharia sent its propagators who had effectively done their job and most of them became Muslims[15].

In 1920 to 30 there was propagation for Islam and hundreds of non-Muslims embraced Islam. In that period thousands of pamphlets and handbills were distributed by Imarat[16].

As it has been discussed in chapter one that *Imarat* is the need of the Islamic life likewise the propagation is back-bone of Islam. So it is under religious duty to do this to which it is unable.

It is submitted that Imarat is trying to do in this direction but some improvement can be expected in future. However due to difficult

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[13] Ibid. p. 246

[14] It is an Arabic word which literally means prohibited tree . This phrase has been derived from the Holy Quran (S 2 A 35 S 7 A 19. 20,22) where Allah (SWT) had asked Adam (AS) not to go under a prohibited tree or eat its fruits.

[15] Miftahi p203

situation and peculiar circumstances it has become very difficult to propagate Islam amongst non-Muslims.

(VI) CONSTRUCTION OF MOSQUES & MADARSAS/ MAKTABS:

In Gorakhpur, where four hundred Gaddis were reconverted in Islam, Imarat built several Mosques and Maktabs for them[17].

In Champaran district where Gaddis were concentrated by Arya Smajis, several Mosques and Maktabs were built[18]. In the same District where Domes embraced Islam were also provided a constructed Mosque by Imarate Sharia[19]. Thus in this field its services are laudable.

3. WORK IN THE FIELD OF EDUCATION:

Apart from Maktabs *Imarate Sharia* has started the technical education also. There is registered trust for this namely Imarate Sharia Education and Welfare Trust. This trust has established six institutions in Patna[20], Darbhanga[21], Champarna[22], Purnea[23], Madhubani[24] and Raur Kela[25]. The Imarat gives technical education for Ifta[26] and Quza[27] also. For this there is Scheme of scholarship to 50 students every year. The Imarat has established a Board of Madarsas. This board affiliates the Madarsas and provides the syllabi. This board is known as Wifaqul Madaris.

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[16] Ibid. p. 199
[17] Ibid pp. 200-201
[18] Ibid.
[19] Ibid.
[20] *(i)*Imarat Institute of Computer and Electronics (ii) Maulana Minnatullah Rahmani Memorial Technical Institute.
[21] Imarat Mujibia Technical Institute Mahdauli, Darbanga.
[22] Reyaz Industrial Training Institute Sathi, Champarn.
[23] Imarat Technical institute Gulab Bagh, Purnea
[24] Al Falah Technical Training Centre Gua Pokhar Bahwara, Madhubani.
[25] Tecnincal Institute Raor kela Orissa.

[26] It is an education for expertise in fiqh and religious Verdict (Fatwa)
[27] It is an education for expertise in Judicial Field.

This is a very good work and a large number of persons appreciate it. But for Wifaqul Madaris there is a criticism that it recommends books of RSS brand. Out of five years the *fiqh* is taught three years while *Hadith* is only two years. There is no training of *tafsir* explanation of Holy Quran or expertise in *Hadith*. It is suggested that the suitable steps may be taken to introduce these in the syllabi of Wifaqul Madaris.

4. POLITICAL ACTIVITIES:

In 1937 there was election for Assemblies. Imarate Sahria took notice and passed a resolution that it will support that party which will seek guidance in the religious matters from it. In case no party comes for alliance a performa of resolution for individual candidates will be issued. Who will resolve, according to the performa only that candidate will be supported by the Imarat. Ahrar Party and United Party both consisting of Muslims did not come for alliance. So A.M. Sajjad founded a third Muslim party i.e, Muslim Independent Party, which secured the highest percentage of votes as well as seats in the Muslim constituencies. It was this party which formed the ministry. The performa of resolution was as under-

" I solemenly resolve:

1. That I shall oppose all those Bills presented to amend or effect the Muslim law. I shall seek guidance in the said Bills from Imarte Sharia and Jamate Ulamae Hind (JUH). I shall abide by the advice of Imarate Sharia and JUH in the said Bills.

2. That I shall support all those Bills presented for liberating the country and economic liberation provided the Bills do not contradict the Islamic principles
3. That I shall not do any act, which is illegal or immoral for vote politics."
4. A.M. Sajjad was of the opinion that it is not wise to depart form election. He considered the Assembly as means to get the religious liberty. Whenever Bills were to be presented before 1940 he was anxious for religious liberation particularly about the Imarat. He wrote letters to leaders, to include Imarat in the list of fundamental rights. He further told that if it is not possible, there must be a post of *Nazir* to look after the matters of *Imarat*[28]. But after independence there is no effective guidance of Imarat in this field. The great thinker and philosopher Allama Iqbal says, "Judaho Din Syasat Se to Rah Jati hai Chengezi": if there is no religion in politics there is barbarism and Chengism. So Imarat should provide the guidance[29].

5. WORK IN THE LEGAL FIELD:

Imarate Sharia opposed the agricultural income tax upon *waqf* property. Congress party did not pay heed but A.M. Sajjad issued the whip to those members who had filled up the Performa of resolution. As a result *waqf* property was exempted from agricultural income tax[30]. Apart from this the Muslim *waqf* Bill was also minutely scrutinized. It suggested certain measures that were incorporated in the Bill. Later on in 1937 that Bill became the Act. Dissolution of Muslim Marriage Bill was

[28] Miftahi pp. 214 - 215
[29] A.M. Sajjad. 'Khutbae Sadarat' (Patna : Imarate Sharia Phulwari. 1999) pp 43. 47. 50

also prepared by Imarate Sharia and published in the papers, which were seriously taken, by JUH and Muslims and the matter was passed by the Parliament.

In 1939 a Bill was prepared by Imarate Sharia, proposing the post of *Nazarate Umoore Sharia* but it could not be passed[31].

In 1939 the congress ministry presented a Bill regarding dowry in which dower was also prohibited but *Imarate Sharia* worked tirelessly and Muslims were not subjected to the Act[32].

Regarding Muslim Personal Law, Imarate Sharia is regularly supporting its cause. In 1969 in a seminar in A.M.U., the then Ameere Shariat presented a research paper[33], which was accepted and appreciated by the scholars. Again in 1972 at Deoband Imarate Sharia supported its cause[34]. In 1972 there was Personal Law Convention and from that day a permanent body was constituted[35]. In 1973 in Hydrabad the Personal Law Board passed its constitution and its services are done accordingly.

In 1929 Sharda Act was passed in which Personal law of Muslims was affected. Imarate Sharia resented and rallied against that. It also said that if that Act was not taken back there would be civil disobedience from Muslims[36], consequently Muslims were exempted from that. It is regretted that now a days in religious affairs Imarate Sharia is not so active as it used to be previously.

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[30] Miftahi p. 215
[31] Ibid. 221
[32] Ibid. 224
[33] Ibid 239
[34] Ibid. 240
[35] Ibid. 242
[36] Ibid.p. 209

6. INTERNATIONAL ACTIVITIES:

(I) OTTOMAN EMPIRE & IMARATE SHARIA:

There was a movement in India to save the Ottoman Caliphate. Imarate Sharia took part in that and a heavy amount was remitted for furthering the cause of *Khilafat*.

(II) PALESTINE & IMARAT SHARIA:

In 1930[37] Imarate Sharia rallied against Balfore Scheme[38]. All over Bihar and Orissa the processions were reported against that. The 19th Jan. 1936 was observed as Palestine day. All over the country there were processions rallies and special *Doa* in *Juma prayer*. Again when Palestinians were prey of the dirty Schemes of Britishers on the Ist Friday of September 1937, the entire Muslims of India led rallies and processions and made speeches on the call of Imarate Sharia.

(III) BENGLADESH & IMARATE SHARIA:

When there was civil war in Bangladesh after its independence, Imarat Sharia sent letters to Mujibur Rehman the then P.M.of Bengladesh and Ms. Indira Gandhi the then P.M. of India on 2nd February 1972. In Mujibur Rehman's letter there was demand for protection of non-Bengalis residing in Bangladesh. For this a delegation was offered to look after the situation and to help them[39]. In the letter of Indira Gandhi there was appeal to use her influence for the welfare of non-Bengalis residing in Bangladesh. These things are good and bold but it must be continued.

7.PUBLIC OPINION REGARDING IMARATE SHARIA:

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[37] Ibid.p.210

[38] According to this scheme British and U.S. Govts planned to divide Pelistine and to establish a Jewish State.

[39] Miftahi.p.236

The best way of judging any organization is the opinionnaire, questionnaire and survey method. I had made a survey with regard to the functioning of Imarate Sharia, amongst general public (Muslims of Bihar), Beneficiaries of Imarat, Islamic Scholars (Ulema), Lawyers, Persons Associated with Imarate Sharia and the result is noted below

(I). RESPONSE OF GENERAL PUBLIC:

The view of general public[40] about Imarate Sharia is much encouraging. But at the same time there is need to take lessons from that. 49% of the masses are of the view that govt. supports the Imarat while 46% are of the view that govt. doesn't support it. Only 5% are of the view that they are not in a position to say any thing. Those who were of the view that government supports it say that govt. accepts the decision of Quza of Imarat[41]. Some of them say that not only govt. supports it by accepting its decisions but also helps with police force whenever it is in need[42]. Others are of the view that govt. provides monetary help along with acceptance of its decisions[43]. While some view that the way of help of govt. is money in the form of aid[44]. However some persons are of the view that they are unable to specify the way of help of the govt.[45] Those who were of the view that govt. does not support Imarat, when asked about its continuance, they said that it is the right of the Muslims. However some[46] of them say that the smooth functioning of the Imarat and Quza may be treated as passive support of the government. The procedure of the institution of the case in Quza is not known to the most

[40] Appendix II (b)
[41] 31%
[42] 5%
[43] 5%
[44] 5%
[45] 3%

of the persons[47]. 85% persons are of the view that Qazis working in Imarate Sharia are competent enough to try and provide solution to the issues arising in the case filed there; while 10% are silent and 5% reply negatively. About procedure of reference of the cases to the Qazis, there is demand from 59% persons to make it known in the general public. 36% persons say that there is no need to refer the cases to the Qazis while some are silent. About the advocates 59% persons are of the view that there is no need of advocates in Imarate Sharia. However, 13% persons are of the view that compromises should be made through advocates. The response about compromise whether the date should be postponed if there is chance of compromise, shows that 100% persons are fearful about litigation. The case may be that after litigation the tension is not lessens[48] between the parties (as one will win and other will lose), which causes enmity. The persons respond an important question whether the regular Court (District Court or Lower Courts) should postpone its hearing if the matter goes to the Qazi Court. 62% persons are of the view that it should be so. While in the reverse case, 51% views are not like that. About the advice of the advocates in the referring the matter to the Shariat Court, 69% views are negative. They say that it is the matter of the prestige for the advocates and their profession. However a 29% of advocates have favoured the recommendation of personal law matters to the Qazis[49].

On the Question that why persons go to Shariat Court the 49% response was that due to religious feeling. However, the other responses were-

i) Due to religious feeling, speedy and chief redressal of cases – 12%

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[46] 15%
[47] 62%
[48] Appendix II (b) Question No. 10 only 55% cases are tension free after judgment.

ii) Monetary ——————————————— saving- 12%

iii) Cannotsay – 12%.

43% response about the reasons of avoidance of Imarate Sharia, by the persons was due to difference of School of thought followed by:

i) Lack of confidence in Imarate Sharia – 37%

ii) Lack of enforcement agency – 15%

iii) Vested interest of the persons– 5%

About this the Assistant secretary of the Imarate Sharia says that it is false to say that persons avoid the Shariat Court. But we see that only thirty percent of the respondents are aware of the functioning and use of Imarate Sharia through *Ulema.* So the *Ulema* of other schools must be influencing the litigants. About the implementing agencies 51% of the persons are of the view that it is not effective while 44% persons treat it effective. About the establishment of Shariat Court the unanimous response is that it is the right of the Muslims. About the role of the Shariat Court 74% opinion favours its functioning. While 15% are critics and rest are silent. 74% opinions say that the establishment of Shariat Court has lessen the burden of the Regular Court. About the awareness campaign the majority of the persons are not aware with the propagators of Imarate Sharia. About the liking of the works of the Imarat 31% responses are in favour of Quza followed by:

i) Educational facilitation programme – 25%

ii) Reformation programme – 17%

iii) Relief work – 16%

iv) Establishment of hospitals– 6%

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[46] Appendix II (c)

However 5% persons dislike the working of Imarat About the assistance to the Imarat 59% persons assist it monetarily. The percentage of the assistance is less as the local collectors of assistances do their job quickly. About the impact of the Imarate Sharia 97% response is positive.

(II). RESPONSE OF DISPUTANTS/BENIFICIARIES:[50]

Since the Question is made for the beneficiaries naturally they would have referred the case earlier[51]. One who has once referred his case naturally new the procedure to file the case in the Shariat Court[52]. While in general public 38% persons are aware with the procedure of filing the case. The parties have been encouraged to go to Shariat Court by the persons[53]. Mostly the questionnaire is filled up by the persons who have won the case[54].

80% litigants are satisfied with the functioning of the Shariat Court. We see that general public have favoured the compromise. But 80% disputant are of opinion that adversary's attitudes has caused the continuance of litigation instead of compromise. The questionnaire has not been filled by those who have reached at compromise. The response that why persons attended /referred their cases was –

i)	Religious factor -	36%
(ii)	Time factor -	26%
(iii)	Monetary factor-	19%
(iv)	Due to fear to face the Regular Court –	14%

[50] Appendix II (B)
[51] 100% of Appendix II (B) 1(1)
[52] Ibid. 2(1)
[53] Ibid. 69% 2(2)
[54] Ibid. 87% 5(1)

In 55% cases tension between the two parties were lessen after the decree as the response of questionnaire 10 shows. The time taken by the Shairat Court is very less. 47% response to the question number 11 of the questionnaire shows that the most of the cases are decided within a year. However 32% cases are decided after one year. About the advice to go to Shariat Court the questionnaire shows that for 34% persons the known agency is of Ulema. Here again the Imarat's agents have failed as only 3% persons are aware with their endeavor. In the matter of faith 87% of the persons have popular faith. But 53% of the persons, who have referred their cases to the Imarat, were not previously aware that Qazi can dissolve the marriage on certain grounds. On the future litigation, if any, 79% of the litigants are of the view that they will prefer Shariat Court. While a section of them say that they will decide it at the proper time. About the satisfaction with Qazis 83% persons are satisfied. Since 66% of the litigants are winners they have accepted the decisions due to this followed by –

i) Religious factor - 19%

ii) Social pressure - 11%

iii) Easy process - 4%

The last question is less responded as most of the persons have won their cases. Those who responded say that they have accepted the decisions while 4% have abused the Qazis.

Thus we see that the persons are fed up with the advocates and established judicial systems and satisfied with the functioning of Imarate Sharia which is a positive sign of the proper functioning of the Institution.

(III).RESPONSE OF LAWYERS AND JURISTS:

The questionnaire regarding Imarate Sharia was filled up by fifty advocates and law teachers. Most[55] of them were knowing the steps taken by Imarat to run the Shariate Court. They were[56] of the view that the authority is only custom because the rule of Quran & Tradition is not prevailed in India[57]. However 40% of the advocates were of the view that since the Shariat Court accepts only personal law matters or property matters, there is no any contradiction with the rules of adjudication in India. The 78% response was religious factor, when they were asked about the reference of the cases. However 16% lawyers were of the opinion that it is due to monetary reason followed by time factor was 7%. About the working of Shariat Court 56% advocates were satisfied. But about recommendation 71% advocates do not recommend as sources of decisions of Shariat Court are of secondary nature rather than primary one. This view is more reflected in their choices in question number ten, 53% advocates and legal experts are of the view that the extra legal procedure is applied there. Even in eleven numbers where there was open space for suggestions for the better functioning of Imarate Sharia the unanimous legal procedure is recommended for is improvement. Any way the majority opinion is that the Shariat Court provides better justice than the Regular Courts in the matter of the personal law[58].

About the role of advocates in referring the cases to the Shariat Court 67% response was that they could play a significant role as the

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[55] 96% Appendix II C 1(1)
[56] Ibid. 2(2)
57 As there is no legal sanctity of Shariat Court
[58] 67% Appendix II C 6(1)

matter firstly go to them[59]. About the role of judges, they are of the opinion that they can play more significant role than advocates because their recognition will make the persons go there (Imdarate Sharia). On the question whether they are satisfied with the functioning of Shariat Court only 34% answer was in affirmative. The reason of dissatisfaction is discussed earlier. The opinion is almost unanimous about the reduction of arrears that the Quza system has lessen the load of the Regular Courts. About the time they were of the opinion that two years time will be taken by Shariat Court[60]. It seems that they are confirm that their access makes the process delayed. About the value of the decision of the Shariat Court the unanimous response is that the judgement is just like an award. The reply against the allegation that the judgement of Imarate Sharia is not just and that is an eye wash the 69% of the persons were of the opinion that the allegation is false and the Judgements are very just, cheapest, less time consuming and having the authority of the Holy Quran and the traditions. The unanimous view about the Shariat Court is that it is alternative system in India. Again 43% opinions say that they will suggest the measures for better functioning. In the last but not least the 69% of the advocates and the academicians are of the view that the decision of the Shariat Court should be recognized and given the weightage at par with the decision of the Regular Courts.

(IV). RESPONSE OF PERSONS ASSOCIATED WITH IMARATE SHARIA:

The employees have responded about the authority of Shariat Court that Quran & *Hadith* gives the authority. About the less reference

[59] 87% Appendix II C 8(1)

of the cases 7% are not ready to accept that cases are less referred. However 60% are of the view that it is due to unawareness of the person. About the steps to increase the number of cases 50% employees are of the view that general awareness campaign is needed about Imarat and Quza. However there is no problem of confidence as question numbers 2(2) and 3(2) show. But response to question number 13(3) of general public shows that 37% people are not satisfied. About awareness campaign 14% employees are silent while 6% say that there is no awareness campaign. However, 80% employees say that there is awareness campaign -

1.	In the masses	44%
2.	In the *Ulema*	13%
3.	In the influencial person	17%
4.	There is campaign but not active	6%

The response to the question number 18 of the general public and question number 12 of disputants show that there might be awareness campaign but not active. About the right of the Muslims, the view of the employees is unanimous that it is right of the Muslims to establish the Shariat Court for their personal law matters and its establishment will provide the practical aspect of the same. The unanimous view also shows that Imarat will help the preservation of the Muslim Culture in India. 81% persons are of the view that the rule of natural justice is followed in Imarate Sharia. When they were asked about the general view whether the established system has failed to provide quicker justice and at cheaper rate. 94% persons responded in affirmative. About the acceptance of the cases the response was as under-

1.	Civil	33%

[60] In chapter 8 the data are collected from Imarate Sharia.

2.	Criminal	0%
3.	Matrimonial	63%
4.	Others	4%

Mostly the cases are related to matrimonial institution. About the limitation over the Qazi, 75% employees working in *Imarate Shaia* say that Qazi's hands are some time tightened; otherwise he could have done some more effective work for justice. About the lessening of the burden of the Court, 94% view is in affirmative. About the rules & procedure of Imarate Shaia 50% view is about Abu Hanifa(Rah). 25% persons say that the rules accepted by 4 Schools of Sunnis are applied here. 6% are of the view that rules accepted by Abu Hanifa (Rah) and Shafayee (Rah) are applied there. 13% say about Abu Hanifa (Rah) and Malike (Rah) while other 6% are of the view that the rule of four Imams minus Ibne Hambal(Rah) is applied there. About the reason of reference of the cases to the Shariat Court 65% persons say that it is due to religious belief. 16% say that reference are made due to monitory reasons while equal number holds the view that it is the time factor. However 3% say that reason is other than those mentioned above. About the cooperation of the Muslims 94% view is that Muslims cooperate Imarate Sharia. About the method and measures of execution of the decrees 78% are of the view that they use the religious pressure. However, 22% say about social pressure. About the difference of School (*Maslaks*) that whose rule is applied either of plaintiff or have defendants. The unanimous response was that established rule of the Imarate Sharia is applied. In the question whether the decision of the Shariat Court is recognized and accepted by the Regular Courts. 75% workers say yes while 13% say no followed by

13% who are silent. It shows that the workers are not aware with the true position of the Imarat. But the last response that the recognition will make the Shariat Court fully effective, 81% view is affirmative. It means those who responded question number 18 are ambiguous. One may say that recognition is not clearly asked in the Question number 18, but with due regard question number 16 may be referred that those persons hold the view that they adopt either religious pressure or the social pressure to execute the decision of the Shariat Court. Thus it is clear that they are not clear whether the decision of the Shariat Court is recognized by the Regular Courts.

(V). RESPONSE OF ISLAMIC SCHOLARS (*ULEMA*)[61]:

Muslim treats their *Ulema* as the backbone of their religious life. Arun Shourie[62] the former editor of 'The Indian Express' newspaper and presently the Cabinet Minister in Central Govt., writes that *Ulema* have much sway over the Muslim masses in India. They (*Ulema*) say that to lead an Islamic life it is necessary to establish the *Imarat.* But they are divided over Imarate Sharia. 50% of them say that Imarate Sharia is fit to be cited as the practical shape of *Imarat*. But 21% are of the view that it may be partially cited as it contains the lacunas. While 25% of them say that it can never be cited, as it has nothing to do with the institution of *Imarat*. About the method of adjudication of Shariat Court 59% *Ulema* are satisfied, 9% are partially satisfied while 27% are not satisfied. About the establishment of separate Shariat Court to the different Schools of thought 57% *Ulema* are responding negatively. While 38% of them

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[61] The detail of this questionnaire is enclosed as Appendix ii E infra, where 50 Ulema of Bihar of different schools are contacted who filled the questionnaire. The result is base upon those questioners.
[62] World of Fatawas.

support it. About the competence to adjudicate the matter of all the Schools together the Hanafi, Maliki, Shafeyee and Hambali by one Qazi the response are affirmative.

About the adoption of the rules of other Schools by Qazis. 95% response is yes but some of them put the condition that the rule must be in consonance with the Holy Quran & the Tradition. About the case law the opinion divided equally. Fifty percent *Ulema* are of the view that the case law should not be followed as the case may be wrongly decided. While other half are of the view that the case law may be serve as precedent. But no one says that it is a duty of the Qazi to follow it. About the authority on the basis of which the cases are decided, 54% *Ulema* are of the view that the Qazis should mention the authority of the Holy Quran and the Tradition. 32% say that the reference of Schoolbook is enough while 14% of them say that there is no need to mention the source or authority. In the matter of avoidance of the Regular Courts 79% *Ulema* say that it is better to avoid the same. The reason of avoidance is differently described. 20% say that the judges are not aware with Islamic rules. 15% say that it is not possible to get proper justice form Regular Courts. 8% are of the view that there is provision of this in the Indian system. 23% say that Qazis are well aware with Islamic rules so they can provide better justice than the judges. This is also corroborated by the views of the advocates. While 13% are of the view that it is prevented in Islamic system to go to the non-Muslim judges. About the *Ameer*s of Imarate Sharia 66% *Ulema* are of the view that they have done enormous services, 5% are of the view that they have done nothing new, while 29% say that they are unable to comment over this. Again the previous questions (No. 5 & 6) are repeated in Question number 12 to which 55% responded affirmatively. 9%

well aware with Islamic rules so they can provide better justice than the judges. This is also corroborated by the views of the advocates. While 13% are of the view that it is prevented in Islamic system to go to the non-Muslim judges. About the *Ameers* of Imarate Sharia 66% *Ulema* are of the view that they have done enormous services, 5% are of the view that they have done nothing new, while 29% say that they are unable to comment over this. Again the previous questions (No. 5 & 6) are repeated in Question number 12 to which 55% responded affirmatively, 9% negatively 5% are silent and rest put certain conditions. However 9% are shocked as they are talked about (schools) *Maslak.*

8. QUESTIONNAIRES:

(1). QUESTIONNAIRE FOR THE PERSONS ASSOCIATED WITH IMARATE SHRAIA, REGARDING SHARIAT COURT (UNDER IMARATE SHARIA)& IMARATE SHARIA, BIHAR.

1. The authority of the Shariat Court in India is derived from ?

(i).	Custom	0%
(ii).	Holy Quran & Hadith	100%
(iii).	Qazi Act 1860	00%
(iv).	Constitution of India	0%

2. The reason of less reference of cases to the Qazi is ?

(i).	Parties are unaware about Qazi Court.	60%

(ii). Lack of initiative by advocates. 7%

(iii). Disbelief in the working of Quza. 0%

(iv). Due to difference of thoughts. 7%

(v). Any other 26%

3. What step would you like to suggest increasing the number of reference of cases to the Quza.

(i). General awareness about Imarat & Qaza 50%

(ii). Development of confidence building measures in the working of Imarat. 0%

(iii). Initiative of the advocates/lawyers. 6%

(iv). Any other. 31%

(v). No need 6%

4. Whether there is any campaign to make the awareness about Imarat?

(i) In the masses 44%

(ii) In the Ulema 13%

(iii) In the influential persons 17%

(iv) No 6%

5. Will Imarat help in realization of religious rights of Muslims?

(i) Yes 100%

(ii) No 0%

6. Will Imarat help in preserving the Muslim culture in India?

(i) Yes 100%

(ii) No 0%

7. Whether Imarate has brought any attitudinal change in outlook of the Muslims?

(i)	Yes	81%
(ii)	No	6%
(iii)	Can't say	13%

8. Is the idea that the process of decision making of Imarat & Quza is based on rule of natural justice?

(i)	Yes	81%
(ii)	No	6%
(iii)	Can't say	13%

9. Is it fact that persons believe that *Nyaya Panchayats* at village level and Regular Courts at different levels have badly failed to provide justice within reasonable time and made it difficult to have justice at cheaper rate.

(i)	Yes	94%
(ii)	No	0%
(iii)	Cannot say	6%

10. We accept the cases related to.

(i)	Civil	33%
(ii)	Criminal	0%
(iii)	Matrimonial	63%
(iv)	Any other	4%

11. Is it true that the hands of Qazi are sometimes tightened by the limits of the circumstances?

(i)	Yes	75%
(ii)	No	12%
(iii)	Can't say	13%

12. Do you think that the Imarat has eased the burden of the Regular Courts?

(i)	Yes	94%
(ii)	No	6%
ii)	Can't say	0%

13. Imarat's source of guidance is?

(i)	Quran. Hadith, Ijma, Qayas accepted by Imam Abu Hanifa.	50%
(ii)	Accepted by Imams Malik, Shafeyee and Hambal	25%
(iii)	Accepted as Ahle Hadith.	0%
(iv)	Other than this.	25%

14. The persons refer their cases due to?

(i)	Religious belief.	65%
(ii)	Less expense	16%
(iii)	Quick disposal	16%
(iv)	Any other reason	3%

15. Whether the parties/Muslims cooperate with Imarat in resolving the case?

(i)	Yes	94%

(ii) No 6%

16. What is the method of execution of decision of Qazi?

(i) Social pressure 22%

(ii) Religious pressure 78%

(iii) Other than this 0%

17. If parties are of different schools of thought which school is preferred in decision.

(i) Plaintiff's School of thought 0%

(ii) Defendant's School of thought 0%

(iii) Established rule of Imarate Sharia. 100%

18. Is the decision of Shariat Court recognised by Regular court?

(i) Yes 75%

(ii) No 13%

(iii) Can't say 12%

19. Do you feel that recognition & sanction will make the Shariate Court more effective?

(i) Yes 81%

(ii) No 19%

(2). QUESTIONNAIRE FOR THE GENERAL PUBLIC REGARDING SHARIAT COURT (UNDER IMARATE SHARIA)& IMARATE SHARIA,BIHAR.

1. Do you think that Govt. supports Imarat and Quza system?

(i) Yes	49%
(ii) No	46%
(iii) Can't say	5%

2. If supports what is the way ?

(i)	Allowing it to continue.	15%
(ii)	Acceptance of the decisions.	31%
(iii)	Police help whenever they want.	5%
(iv)	Monetory help.	5%
(v)	Can't say	3%

3. Do you know the procedure of filling the case?

(i)	Yes	38%
(ii)	No	62%

4. Do you think that Qazis are competent to decide the matter of personal law?

(i)	Yes	85%
(ii)	No	5%
(iii)	Can't say	10%

5. Do you think that Qazis are to be referred every case of Muslims?

(i)	Yes	59%
(ii)	No	36%
(iii)	Can't say	5%

6. Should the advocates of the disputants be allowed to argue case before the Qazi Court?

(i)	Yes	41%
(ii)	No	59%

7. What opportunity ought to be provided to the disputant to establish their case before the compromise is arrived at?

(i)	Arguments of the advocates	13%
(ii)	Arguments of the parties	54%
(iii)	Arguments of the witnesses.	23%
(iv)	Any other	10%

8. Should the date be sometimes postponded in case of the possibility of future compromises?

(i)	Yes	100%
(ii)	No	0%

9. Should the Regular Court postpone the hearing of matter is heard in Shariat Court?

(i)	Yes	62%
(ii)	No	31%
(iii)	Can't say	7%

10. Vice-versa.

(i)	Yes	49%
(ii)	No	51%

11. Do you think that advocates advise to institute the case in Regular Courts rather than Shariat Court?

(i)	Yes	28%
(ii)	No	69%
(iii)	Can't say	3%

12. Why persons used to go to Shriate Court?

(i)	Due to speedy redressal.	12%
(ii)	Due to monetary saving.	12%
(iii)	Due to religious feeling.	49%
(iv)	Due to easy process.	15%
(v)	Can't say	12%

13. Why some persons avoid to go to Shariat Court?

(i)	Due to lack of coercive agency	15%
(ii)	Due to difference of School of thought	43%
(iii)	Due to lack of confidence in Shariat Court	37%
(iv)	Vested interest	5%

14. Do you think that the implementing agencies of the Shariat Court are effective?

(i)	Yes	44%
(ii)	No	51%

(iii) Can't say 5%

15. Do you think that establishment of Shariat Court is right of Muslims?

(i) Yes 100%

(ii) No 0%

16. Do you think that the role of Shariat Court is merely confined a propaganda value rather than dispensation of justice?

(i) Yes 15%

(ii) No 74%

(iii) Can't say 11%

17. Do you feel that the establishment of Shariat Court has lessened the burden of Regular Courts?

(i) Yes 74%

(ii) No 20%

(iii) Can't say 6%

18. By which means you become aware with Shariat Court?

(i) By Noqaba 8%

(ii) By Local Alim 30%

(iii) By Disputants 10%

(iv) Other than this 52%

19. Which thing of Imarat do you like? (order of preference)

(i) Educational facilitation programme. 25%

(ii) Hospitals 6%

(iii)	Relief work	16%
(iv)	Quza work system	31%
(v)	Reformation programme.	17%
(vi)	Dislike	5%

20. How much %age you send to Imarat?

(i)	Of gift	%
(ii)	Of zakat	%
(iii)	Of sadaqh	%
(iv)	Charm Qurabni	%

21. Do you think that Imarate Sharia has put an impact on social and religious life of Muslims?

(i)	Yes	97%
(ii)	No	3%

(3). PERSONS RELATED TO TRADITIONAL LEGAL SYSTEM/JURISTS/ ACADEMICIANS (LAW), ABOUT SHARIAT COURT (UNDER IMARATE SHARIA) & REGARDING IMARATE SHARIA, BIHAR.

1. Are you aware of the steps taken by the Imarate Sharia to run Shariat Court?

(iii)	Yes	96%
(iv)	No	4%

2. The Shariat Court & Imarat of Bihar gets the authority from?

(i)	Holy Quran & Hadith	40%
(ii)	Custom	60%
(iii)	Qazi's Act	0%
(iv)	Indian Constitution	0%

3. Why persons refer their cases to the Shariat Court?

(i)	Due to religious factors	78%
(ii)	Due to Monetory reasons	15%
(iii)	Due to quick disposal	7%

4. Have you a popular faith in the functioning of Shariat Court?

(i)	Yes	56%
(ii)	No	44%

5. Do you favour referring of Muslim all personal Law cases to the Shariat Court?

(i)	Yes	29%
(ii)	No	71%

6. Do you think that Shariat Court can deliver better justic than the Regular Court (in personal law matters) ?

(i)	Yes	67%
(ii)	No	33%

7. What role can a lawyer play in getting a matter referred to the Shariat Court?

(i)	Very significant role	67%
(ii)	Less significant role	29%
(iii)	Insignificant role.	4%

8. What role can a judge of the Regular Court play to refer the cases of the Shaiat in Court?

(i)	Very significant	87%
(ii)	Less significant	2%
(iii)	Insignificant	11%

9. Are you satisfied with the functioning of Shariat Court?

(i)	Yes	34%
(ii)	No	53%
(iii)	Can't say	13%

10. If you are not satisfied what are the reasons of dissatisfaction?

(i)	Improper selection of Qazis	0%
(ii)	Extra legal procedure	53%
(iii)	Lack of sanction	5%
(iv)	Non recognition by Courts.	28%
(v)	Due to difference on ideological basis.	14%

11. Would you like to suggest any thing for the better functioning of Quza System under Imarate Sharia ?

(i)	Legal Procedure should be strictly followed	52%
(ii)	Without sanction it would be ineffective	23%
(iii)	Without recognition of the Court it will lose its importance	25%

12. Do you feel that the functioning of Shariat Court have reduced the Court's arrears in Bihar?

(i)	Yes	91%
(ii)	No	9%

13. How much time Shariat Court is taking in deciding the matters?

(i)	Less than one year	44%
(ii)	One year	38%
(iii)	More than one but less than two years	18%

14. The decisions of Shariat Court are just like decisions of ?

(i)	Regular Court	0%

(ii) Award of arbitration 100%

15. Do you think that the role of Shariat Court is merely confined to a propaganda value rather than dispensation of justice?

(i) Yes 31%

(ii) No 69%

16. Is it an example of an alternative of dispute resolution?

(i) Yes 100%

(ii) No 0%

17. Would you like to suggest any effective measure to the Qazis to resolve the disputes?

(i) Yes 43%

(ii) No 57%

18. The dejurc position of decision of Shariat Court regarding personal law matters should be?

(i) Equal to Regular Courts 69%

(ii) Like award of arbitrator 31%

(4). QUESTIONNAIRE FOR ISLAMIC SCHOLARS (*ULEMA*) REGARDING SHARIAT COURT (UNDER IMARATE SHARIA) & IMARATE SHARIA, BIHAR.

1. Do you feel that establishment of Imarat is necessary for Islamic life in India?

(i)	Yes	100%
(ii)	No	0%

2. Is Imarate Sharia fit to be cited as a practical shape of Islamic concept of Imarat?

(i)	Fully	50%
(ii)	Partially	21%
(iii)	Never	25%
(iv)	Can't say	4%

3. Are you satisfied with the method of adjudication of Imarate Sharia?

(i)	Yes	59%
(ii)	To some extent	9%
(iii)	No	27%
(iv)	Can't say	5%

4. Is it appropriate to establish separate court for different schools of thought?

(i)	Yes	38%
(ii)	To some extent	57%
(iii)	No	5%

5. Is a Qazi competent to adjudicate the matter of other School of thought than Qazi?

(i) Yes 95%

(ii) To some extent 5%

6. Is Qazi authoriz to adopt the rule of other Schools of thought in emergency?

(i) Yes 95%

(ii) To some extent 0%

(iii) No 5%

7. Should a Qazi follow the case law?

(i) Yes 50%

(ii) No 50%

8. In deciding the issues, the Qazis should?

(i) Mention that from which Hadith and/or Ayat of the Holy Quran they deduce the rule. 54%

(ii) Mention that from which School book they deduce 32%

(iii) No need to mention 14%

9. Is it better to avoid the Regular Courts by Muslims?

(i) Yes 79%

(ii) No 21%

10. Why one should avoid Regular Court for personal law matters?

(i) Judges are not aware with Islamic rules. 20%

(ii) It is not possible to get justice properly in Regular Courts. 15%

(iii) There is provision in Indian law. 8%

(iv) Qazis are well aware with Islamic rules so they can provide better justice. 23%

(v) Sunnah prevents Muslims to go in an unIslamic court. 13%

11. What is your opinion about Amir of Imarate Sharia?

(i) They have done enormous services. 66%

(ii) They have done nothing new. 5%

(iii) Cannot say. 29%

12. Is Qazi authorising to give verdict according to other School of thought?

(i) Yes 55%

(ii) Yes, if that is in accordance with Quran & Hadith 13%

(iii) No but only Quran and Hadith 9%

(iv) No 9%

(v) Can't say 5%

(vi) It is bad to talk about Schools 9%

13. Do you think that in certain cases the intervention of Qazi is necessary otherwise the matter will not be treated as resolved in the eyes of Islam?

(i) Yes 100%

(ii) No 0%

(5). QUESTIONNAIRE FOR BENEFECIARIES, DISPUTANTS OF SHARIAT COURT (UNDER IMARATE SHARIA), REGARDING SHARIAT COURT (UNDER IMARATE SHARIA),& IMARATE SHARIA, BIHAR.

1. Have you ever referred your case to the Shariat Court?

(i) Yes 100%

(ii) No 0%

2. Do you know the procedure to file the case in Shariat Court?

(i) Yes 100%

(ii) No 0%

3. Did your advocate ever encourage you to refer your cases to Shariat Court?

(i) Yes 17%

(ii) No 83%

4. Did you feel the need of service of the advocate in Shariat Court?

(i) Yes 4%

(ii) No 96%

5. Was the decision in your favour?

(i) Yes 87%

(ii) No 13%

6. Are you satisfied with the functioning of Shariat Court?

(i)	Yes	80%
(ii)	No	20%

7. What were the reasons, which finally created obstacles in not arriving at the compromise in your case?

(i)	Attitude of opponent.	78%
(ii)	I did not want	13%
(iii)	Lack of Imaratc Sharia	0%
(iv)	Can't say	9%

8. What were the reasons, which helped you and your adversory to reach at a compromise and finally dispose off the cases?

i) Quick disposal

ii) Advisory submission

iii) Any other

9. Why did you refer attended your case in Shariat Court?

i)	For quick disposal	26%
ii)	Due to absence of fee	19%
iii)	Due to fear to face regular court	14%
iv)	Due to religious feeling	36%
v)	Can't say	5%

10. Has the tension between you and your adversory lessended and relationship improved after the settlement in shriat court?

(i)	Yes	55%
(ii)	No	45%

11. How much time was taken by Shariat Court to settle your case?

i)	Less than one year	47%
ii)	One year	32%
iii)	More than one year	21%

12. Who suggested you to go to Shariat Court?

i)	Naqib of Imarat,	3%
ii)	Alim of my area	34%
iii)	Inner conscience	26%
iv)	Any other	37%

13. Have you popular faith in working of Imarate Sharia?

(i)	Yes	87%
(ii)	No	13%

14. Are you aware that Qazi can dissolve the marriage if there is reasonable ground?

(i)	Yes	47%
(ii)	No	53%

15. Now which court you will prefer?

(i)	Shariat Court	79%
(ii)	Regular Court	15%

(iii) Time will say 6%

16. Are you satisfied with the Qazis of Shariat Court?

(i) Yes 83%

(ii) No 17%

17. Why have you complied the orders of Shariat Court?

i) Due to social pressure 11%

ii) Due to easy process /order 4%

iii) Due to religious feeling 19%

iv) Other than this. 66%

18. What was your reaction when you lost the case or when judgement was delivered against you?

i) Challenged the decision in Regular court 0%

ii) Challenged the decision in Shariat Court 0%

iii) Abused the Qazi 4%

iv) Accepted the decision 13%

CHAPTER - 9

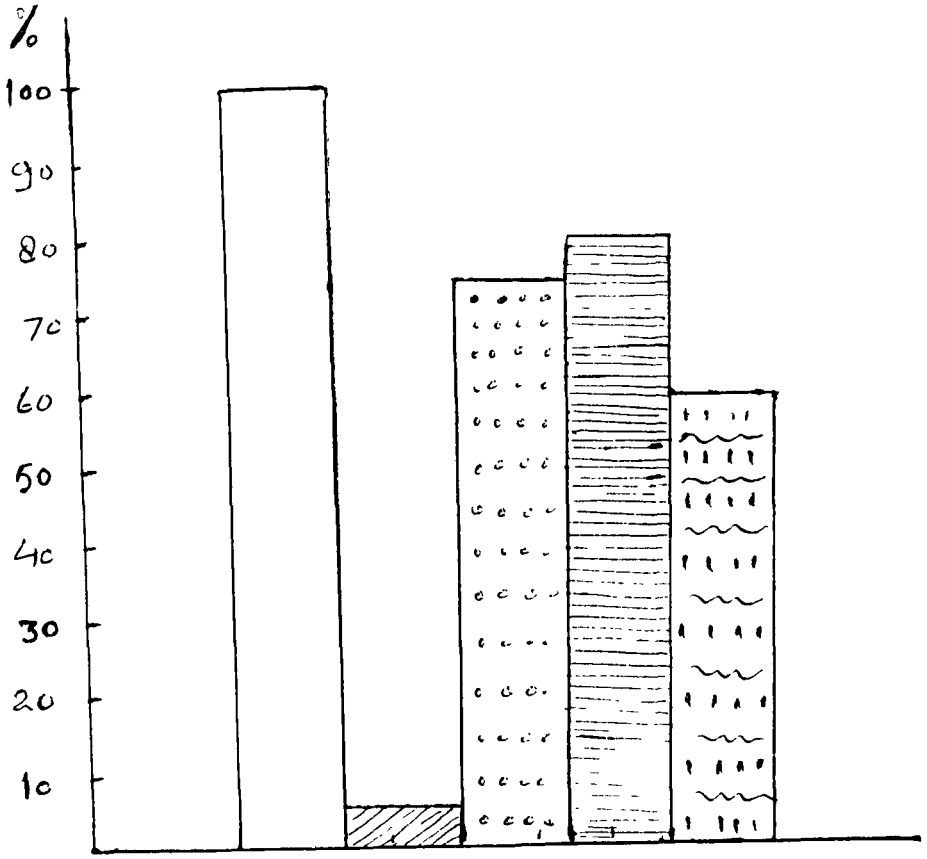
DEVELOPMENT OF MUSLIM PERSONAL LAW AND IMARAT

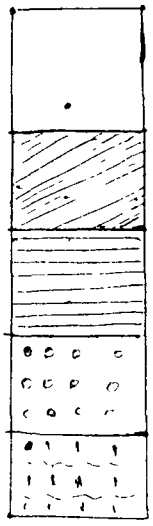
"साहित्य संगीत कला विहीनः
साक्षात पशु पुच्छ विषाण हीनः"

कालीदास

"One who is not aware with Instrument, Arts and Literature, he is animal although not having the tails and horns"

Figure Showing the Opinion About the Satisfaction with the Working of Imarate Sharia





Opinion of the Persons Associated with Imarate Sharia

Opinion of the Advocates/Jurists

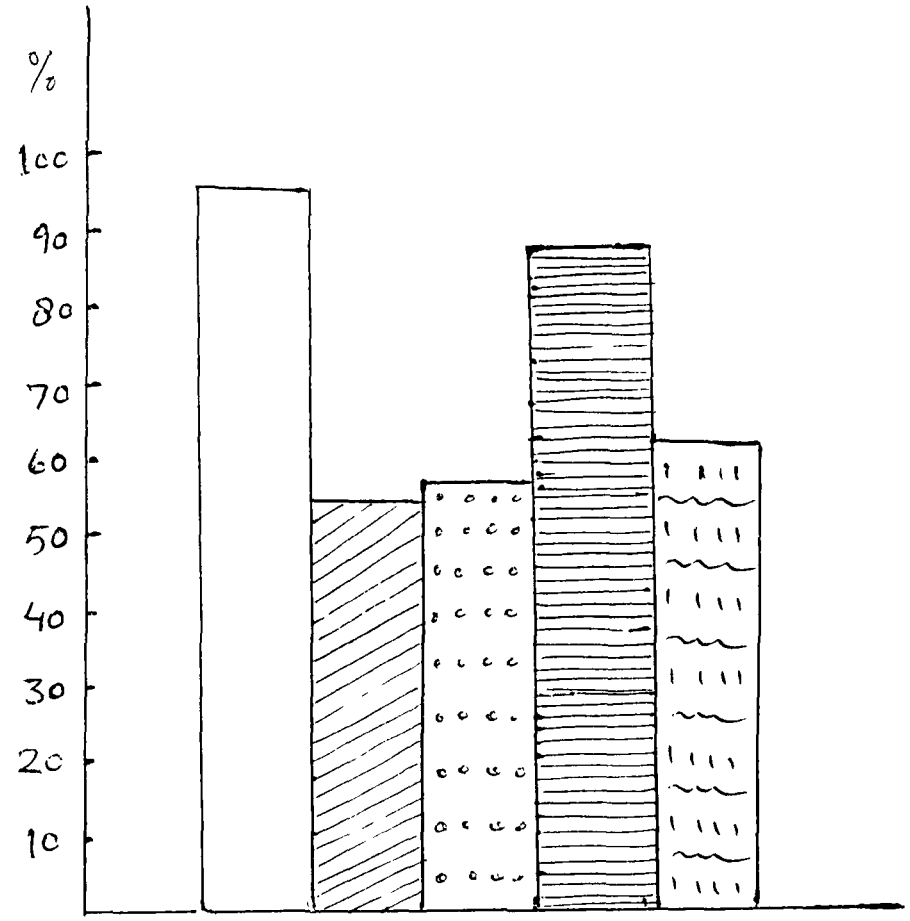
Opinion of the Disputants

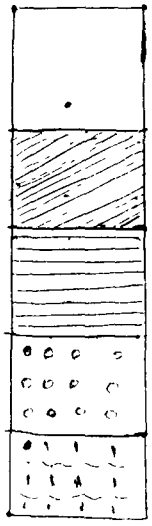
Opinion of the General Public

Opinion of the Ulema

Graph Showing the Opinion as to How Much Cooperation Imarate Sharia is Getting

From the following





Opinion of the Persons Associated with Imarate Sharia

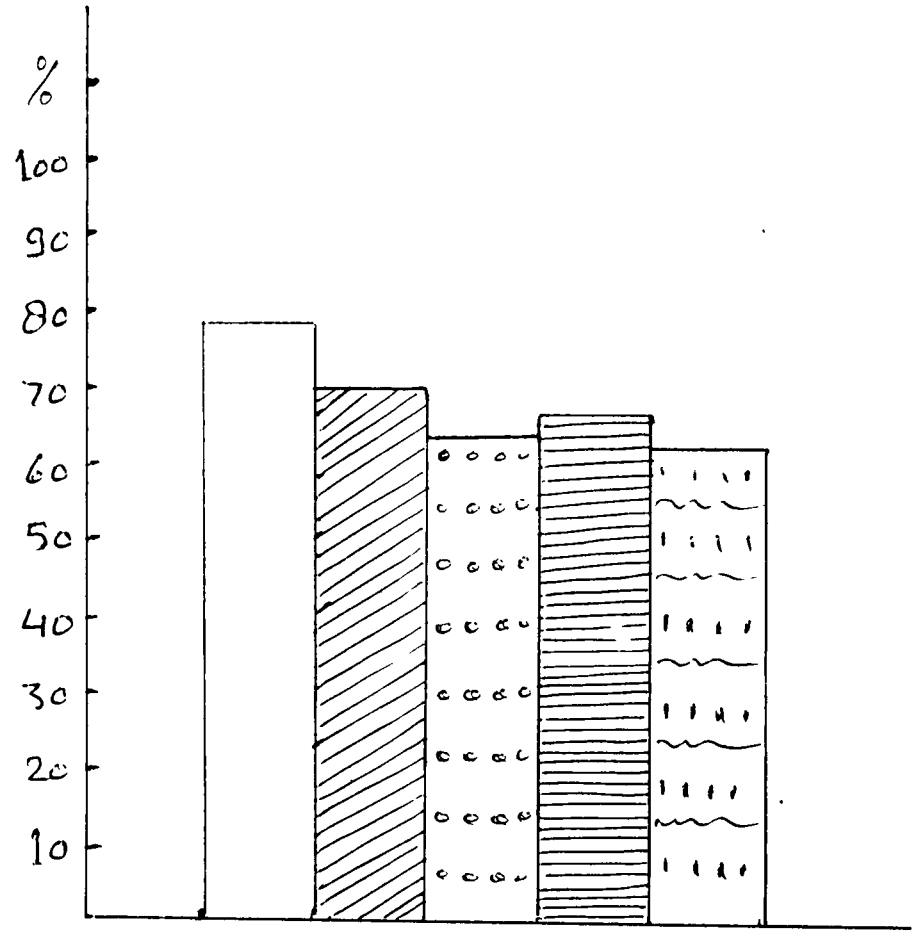
Opinion of the Advocates/Jurists

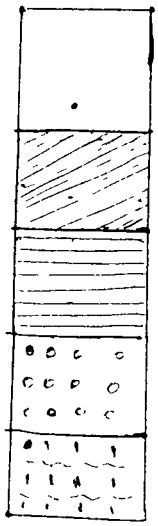
Opinion of the Disputants

Opinion of the General Public

Opinion of the Ulema

Graph Showing the Opinion About the Effectiveness of Executing Measures of Imarate Sharia





Opinion of the Persons Associated with Imarate Sharia

Opinion of the Advocates/Jurists

Opinion of the Disputants

Opinion of the General Public

Opinion of the Ulema

CH-9: ROLE OF IMARATE SHARIA IN DEVELOPMENT OF MUSLIM PERSONAL LAW

1. INTRODUCTION:

Development of Muslim Personal Law means to give Islamic colour to any rule, regulation, by law or legislation, which may have connection with personal law. To give Islamic colour means the rule and regulation of the Holy Quran and the Tradition of the Prophet should prevail. Muslims believe that Quran is revealed knowledge and wordings of Allah (SWT). It is the first and foremost sources of Islamic Law. In the Holy Quran the Almighty Allah has revealed to follow Him and His messenger. He commands[1]

قُلْ أَطِيعُوا اللَّهَ وَالرَّسُولَ فَإِن تَوَلَّوْا فَإِنَّ اللَّهَ لَا

"Say: "Obey Allah

[1] The Holy Quran S.3.A.32. The similar command has been given in S.3.A 132, 50; S.4.A59; S.5.A.92; S.8.A.1, 20, 46; S.20.A.90; S.24.A.54, 56; S.26A 8; 110, 126, 131, 144, 150, 163, 179; S.43 A63; S.46A 32, 33, S. 58A.13; S.64A12, 16; S.71A3

وَأَطِيعُوا اللَّهَ وَالرَّسُولَ لَعَلَّكُمْ تُرْحَمُونَ

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنكُمْ

And His Messenger"

Thus it is clear that in Islam one is to follow the commandments of Allah (SWT) and His messenger.

Apart from this there is provision of following *Ameer* (head) also. Allah (SWT) has commanded -

يَـٰٓأَيُّهَـا ٱلَّـذِينَ ءَامَنُـوٓا۟ أَطِيعُـوا۟ ٱللَّـهَ وَأَطِيعُـوا۟ ٱلرَّسُـولَ وَأُو۟لِـى ٱلْأَمْـرِ مِنكُـمْ ۖ

"Oye who believe!
Obey Allah, and
Obey the Messenger,
And those charged
With authority among you."[2]

The word 'charged' also includes '*faqih*' or 'jurists' but where there is difference amongst the persons.Allah commands -

فَـإِن تَنَـٰزَعْتُمْ فِـى شَـىْءٍ فَـرُدُّوهُ إِلَـى ٱللَّـهِ وَٱلرَّسُـولِ إِن كُـنتُمْ تُؤْمِنُونَ بِٱللَّـهِ وَٱلْيَـوْمِ ٱلْـَٔاخِـرِ ۚ ذَٰلِـكَ خَـيْرٌ وَأَحْسَـنُ تَـأْوِيلًا

"If ye differ in any thing
Among yourselves, refer it
To Allah and His Messenger,
If ye do believe in Allah
And the Last Day:
That is best, and most suitable
For final determination."[3]

---

[2] Ibid S.4 A59

Maulana Mohammed of Juna Garh is of the view[4] that the commandment of *Ameer* or *Faqih* is to be followed only when that is in consonance with the commandment of Allah and the Prophet. If the incharge is following the different view the subjects are under obligation to correct him and he is also commanded in the above verse *(ayat)* to submit him before the commandment of Allah and the Prophet (SAW).

2. MODES OF SUBMISSION:

Once a delegation of the companions of the Prophet was sent.[5] Prophet (SAW) reminded the delegation to follow their *Ameer.* The *Ameer* at one place ordered to collect the wood and torch, which was done. He further ordered the *mamurin* (Companions of the Prophet upon whom he was *Ameer*) to jump in that fire one by one. Some persons agreed to follow while another group defied the order. On return, the story was reported to the Prophet who appreciated the defiance saying that no instruction is to be followed, which is made against the commandment of Allah (SWT), and what Prophet says that is the commandment of Allah[6].

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[3] Ibid

[4] Maulana Mohammed Juna Garh, 'Al Quranul Karim' commentators - 1). Maulana Salahuddin Yusuf, 2). Dr.Wasiullah, 3). Dr.Akhtar Jamal Luqman (Reyadh : Ministry of Saudia) 1417 AH, pp. 230-231.

[5] Abdul Matin Maiman 'Hadith Khair wa Shar' (Bangalore : Darul Hadithia).

[6]

وَمَا يَنطِقُ عَنِ

ٱلْهَوَىٰٓ ۝٣ إِنْ هُوَ إِلَّا وَحْىٌ يُوحَىٰ

"Nor does he say (aught)
Of his own Desire

If there was any order or practice of the *Ameer* against Quran or Tradition in the time of companions, the *Ameer* was informed about the correct thing e.g.

1. Caliph Abu Baker (Raz) had ordered not to include the grand mother in the list of inheritors who later withdrew his order when he heard the Tradition by Mughera bin Shoba and Mohammad bin Muslima.[7]
2. Caliph Umar (Raz) ordered the fixation of dower. When an old woman objected citing S.4 A20.[8] Upon which Caliph Umar (Raz) did not fix the dower.

Thus it is clear that *Ameer* or jurist is to uphold the commandment of Allah and the Prophet. Where there is deviation from this, the order of the *Ameer* would be temporary and worth rejection.

3. MUSLIM SCHOLARS AND DEVELOPMENT OF MUSLIM PERSONAL LAW :

It isnot less than
Inspiration sent down to him." (S.53 A. 3,4)

[7] Memon,p. 141.

[8]

وَإِنْ أَرَدتُّمُ ٱسْتِبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَءَاتَيْتُمْ إِحْدَىٰهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْـًٔا أَتَأْخُذُونَهُۥ بُهْتَٰنًا وَإِثْمًا مُّبِينًا

" But if ye decide to take
One wife in place of another,
Even if ye had given the latter
A whole treasure for dower

A group of *Ulema* say that this is the time of *Taqlid* (only to follow). They give the following arguments as S.M.A. Habibi writes[9]:

1. Biasedness of the persons.
2. Quzat's *Taqlid* is preferred by intellectuals.
3. Codification of law on the basis of Schools.
4. Lack of depth of knowledge in the later scholars.
5. Vast knowledge of early Islamic scholars.

But the same author has collected the opinion of Dr.Sir Mohd. Allama Iqbal, Dr. Mustafa Ahmad Zarqa, and Shia view for continuation of *ijtehad* and has suggested the practicality of *ijtehad.* Any way the establishment of four schools is a fact. Although the scholars criticise its establishment but the majority of the persons follow it i.e.Hanafi school, Maliki school, Shafeyee school and Hambali school. In India mostly persons are descendants of followers of Hanafi school. But the question arises from amongst the important *faqih* or *Mujbahid* in Hanafi school, who is to be given more weightage. It is advisable to begin by explain the rules for the determination of the relative weight to be attached to the opinion of the learned *Mujtahids*. The word *Mujtahid* is defined in *Talvih*, which is a recognized book on the Muslim Law.

" A Muslim, wise, adult, intelligent by nature, well acquainted with the meaning of Arabic words and mandatory passages in the Quran, learned in the Traditions of the Prophet found in text- books or orally reported, as well as those which have been abrogated."

Take not the least bit of it back."

[9] Syed Ahmad Moin Habibi.' Islam ka Nizame Qanoon' (Aligarh: A.M. University), 1964, pp. 115-123.

In *Kahastani* it is witten

"Where the learned say that a Qazi has power to give an opinion in respect of a particular thing, the word Qazi means a Qazi who is a *Mujtahid*, and a *Mujtahid* is defined to mean a person who knows the Holy Quran and the Hadis well, and is competent to draw inferences from the words of God and the sayings of the prophet.'

There is no distinction between a *Mufti* and a Qazi according to the opinions of the learned. The following passage in *Tahtavi* also supports this view.

"The purport of the saying alluded to by Sheikh Kasim in his book named *Tashih* is that there is no distinction between 'Kazi' and '*Mufti*'."

He further says, "Imam Abu Yusuf has said, that giving a *fatwa* is not permissible to any one but a *Mujtahid*. It is said on the authority of Fathul Qadir that all the jurists are strongly of opinion that *Mufti* and '*Mujtahid*' are one and the same. One who is not a *Mujtahid* but only recollects the sayings of *Mujtahids* cannot be a *Mufti*.

Imam Abu Hanifa, styled the Great Imam, was the acknowledged founder (master) of the Hanafi school. Out of his numerous pupils only forty were looked upon as *Mujtahids*; but four alone among them were preeminent. They have been arranged as follows by some of the writers according to the degree of their preeminence:

1. Abu Yusuf
2. Mohammad
3. Zafar
4. Hasan Ibne Ziad

"A mufti should give his final *fatwa* in according with the above *Ulema* if they agree; but if they differ the learned are not agreed as to the course which is to be followed by the *Mufti*. The most approved doctrine is that a *fatwa* should generally be given in accordance with the opinion of Imam Abu Hanifa. This opinion is also supported by the *Sirajia* and other books. The opinion of Abu Yusuf should be next acted upon, and then that of Mohammad then of Zafar and Hasan Ibn Ziad."

In Kitabul Kaza it is said:

"A Qazi like a *Mufti* should generally rely on that of Abu Yusuf, then Muhammad, then on that of Zafar and Hasan Ibn Ziad. This is the most correct view; and has been held to be correct in *Sirajia* and *Munnia*. *Havikudsi* (which is a famous book) says, that the weight of argument should be considered when there is a difference of opinion. The former should be adopted as a general rule; and no one should adopt a different course unless he is a *Mujtahid*."

Durrul-Mukhtar with reference to *Bahrurraik* declares it to be a weak point, and says that the correct view is that the opinion of Abu Hanifa should be acted upon. Even in case of a difference of opinion it is written, that only when the Qazi or the *Mufti* is a *Mujtahid* he can choose one opinion out of conflicting ones, otherwise there is no authority to do so.

From the judgment of Mahmood, J. in *Abdul Kadir V. Salima* it would appear that there is some passage in the *Durrul-Mukhtar* in support of the opinion, that in case of disagreement between Abu Hanifa and his pupils, the opinion of the latter should prevail; but there is no such passage in the *Durrul Mukhtar* as Dr. Jung observes.

In commenting on the term *Ikhtiar, Raddul Mukhhtar* says-

"If one of the two opinions be that of the Imam and the other of some one else, there is no power to give preference to such other opinion over that of the Imam, because when the two dicta conflict they cancel each other; consequently we must revert to the original opinion, that is, give preference to the opinion of the Imam." In *Raddul-Mukhtar* a reference is made to the *Fatawa Khairia* and *Bahrurraik*. *Fatawa Khairia* says-

"In the opinion of the Hanafi jurists it is a settled principle, that no *fatwa* should be given, and no opinion acted upon, except that of the great Imam. One should not act contrary to his opinion and in conformity with the opinion of Imam Abu Yusuf and Imam Muhammad or one of them or that of any other person except when it is compulsory, as in questions of cultivation." Although it may have been explained by the learned in religion that the *fatwa* is in accordance with the opinions of Imam Abu Yusuf and Muhammad; because the great Imam is the founder of the principles and the first Imam. It is written in *Bahrurraik*, that it is not only allowable but also incumbent that a *fatwa* be given according to the opinion of the great Imam, although it may not be certain upon what authority his saying was based.

Syed Muhammad Amin has referred to the passage in *Fatawa Sirajia* are as follows-

"The *fatwa* should generally be according to the opinion of Imam Abu Hanifa, then according to the opinion of Abu Yusuf, then Muhammad, then Zafar and Hasan Ibn Ziad. Some say that when Abu Hanifa is on one side and Abu Yusuf and Muhammad on the other, the Mufti has the option; but the first opinion is more preferable when the Mufti is not a *Mujtahid*."

Consequently when the opinion of Abu Hanifa is on one side and the concurrent or dissenting opinion of his pupils on the other, then if the *Mufti* or the Qazi is not a *Mujtahid*, he should pass an order or give his *fatwa* according to the opinion of Abu Hanifa. He alone is recognized as the supreme master and not his pupils. In the books on Muslim Law there are sayings of Abu Yusuf, Mohammad, Zafar and Hasan Ibn Ziad wherein they themselves acknowledge that they have not originated any principle, that whatever they have said was derived from the sayings of Abu Hanifa, and they say with a solemn oath[10].

There are however a certain number of principles, which are governed by the opinion of the two disciplines, in some eve by the opinion of Imam Muhammad or that of some other disciple of Imam Abu Hanifa. But these are well known cases, and upon which a large number of the learned *Ulema* and *Mujtahids* are agreed, and these are specially mentioned in the law books.

There is another mode of determining which opinion is preferable. The learned in *fiqh* have remarked that texts themselves have preference over their commentaries, and that the commentaries are preferable to the *fatawa*.

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[10] Dr. Jung p.6As per *Durrul-Mukhtar* Every one of them used to quote his authority and give it precedence. The saying of no disciple is outside the sayings of the Imam. In *Kitabul Zina* and the *Walwalajiah*. It is stated that Abu Yusuf said, that he had not expressed any views differing from Abu Hanifa, except when the latter himself had held them. It is said of Imam Zafar, that he said that he had not expressed any views differing from Abu Hanifa, in any matter except when the latter himself had held them formerly, and then abandoned them. Consequently it indicates that none of the pupils differed from the opinion of Abu Hanifa, but their opinions and sayings were in conformity with the sayings of their teacher Abu Hanifa. At the end of the *Havi-i-Kudsi* it has been stated of all the principal companions, such as Abu Yusuf, Muhammad, Zafar and Hasan, that they remarked that they had not said anything concerning any principle but that which was in conformity with the sayings of Abu Hanifa, and for this they have taken a solemn oath. Consequently under

There are however a certain number of principles, which are governed by the opinion of the two disciplines, in some eve by the opinion of Imam Muhammad or that of some other disciple of Imam Abu Hanifa. But these are well known cases, and upon which a large number of the learned *Ulema* and *Mujtahids* are agreed, and these are specially mentioned in the law books.

There is another mode of determining which opinion is preferable. The learned in *fiqh* have remarked that texts themselves have preference over their commentaries, and that the commentaries are preferable to the *fatawa*. When two correct sayings conflict, the Qazi or *Mufti* has power to pass an order according to one of them, and it is not permissible to use this power, when one saying is contained in the text or the commentaries and the other in the books of *fatawa*, in which case it is incumbent to give preference to the saying in the text and commentaries over that of the *fatawa*.

When there are two correct sayings on one point, it is lawful to order or give the fatawa according to either of them.

It is expedient that the power be limited to the case where neither of the sayings is contained in the text, as we have said above on the authority of *Alberi*. And from the argument used in *Kaza-ul-Fawait* with reference to *Bahrurraik* it is clear, that when there is a conflict between a text and a *fatwa*, it is better to conform to the text; and such is the case if the commentaries. The learned in *fiqh* have said that, which is in the commentaries; and that commentaries are preferable to the *fatawa*. This is so, when it is specified that both of them are correct or where there is no such specification. But if one doctrine is to be found in the text, and the learned in *Fiqh* have made no

specification as to its correctness; or on the contrary explained the correct purport of its converse then Allama Kasim is of opinion that the corrected *fatwa*, should have preference, because the correctness of the one is explained, and the explanation of the other is to be verified and that express correctness is preferable to the implied one.

Again with reference to *Anfaul Vasail* it is said:

"Saying should be acted upon, which is in the text. because when there is conflict between the text and *fatawa*, the reliable one is the saying in the text. In the same way, the principles in the commentaries are preferable to those in the *fatawa*."

SUBMISSION:

It is submitted that the above authorities conclusively show, that the master and founder of the Hanafi school was the great Imam and his sayings are preferable to those of his pupils; none of whom have a right to be termed masters or founders nor the commentaries of the original texts have preference over those of original texts like wise *fatawa* have no preference over the texts and commentaries. So the Judges who have laid down or followed others in contravening the above principles should now be corrected by the High Courts themselves or by the Judicial Committee. It is dangerous to perpetuate bad Law. The Imarate Sharia, if follows the Hanafi school is also to follow the similar way.

4. ESTABLISHMENT OF IMARAT AND IMARATE SHARIA:

The establishment of *Imarat* is itself an Islamic act but it must be expanded at all India level. The qualification of *Ameer* and the role of Imarat have also been discussed in detail in chapters two and eight respectively. The

differences of the Imarats must be met out. There is another Imarat at Sadiqpur, Patna, Bihar; which had been established long before Imarate Sharia. There is one more Imarat known as Idarae Sharia, Sultan Ganj, Patna, Bihar; which was established in early sixties of 20th century. There is need of coordination and co-operation amongst them. It may be like the opinion of the *Sahaba*[11] that one *Ameer* should have been from *Ansar*[12] and another from *Muhajirin*[13]. But this view was not accepted by the companions (Raz) of the Prophet and Abu Bakar (Raz) was chosen as Caliph. So there is need to establish one Imarat. If it is not done the followers of one institution will criticise the functioning of other (and it happens also). Imarate Sharia says that it is ready to accept any body as *Ameer* provided *Ahlul Hil Wal Aqd* are agreed over him. But Imarate Ahle Hadith doubts over this. There is also allegation against Imarate Sharia that it follows the secondary sources rather than primary one. Idarae Sharia says that Imarate Sharia is running with weaknesses. There is weakness in the faith of its workers. So they have established another *Imarat*. But the true *Imarat* is one, which makes unity. Despite the seniority, Imarate Ahle Hadith has no popularity as Imarate Sharia has. The Idarae Sharia is also not having mass level support in Bihar. So it is the duty of the Imarate Sharia to unite the persons by convincing the other institutions or / and by mass contact.

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11 Sahaba plural of Sahabi i.e. companions of the Prophet (SAW).

12 People of Medina who helped the Prophet and his companions.

13 Companions of the Prophet (SAW) who migrated from Mecca to Medina in 620AD.

5. IMARATE SHARIA AND DEVELOPMENT OF MATRIMONIAL INSTITUTION:

Marriage is one of the basic needs of human society. Islam considers it as an essential incident. But it never meant that it should be an occasion of extra vagancy or it be treated as burden upon the society. In this field Imarate Sharia has done enormous works. It has published several booklets to get the unIslamic practices uprooted. A mass campaign by Imarate is made against the dowry and its demand. It wants to make this institution very simple which is inconsonance with the Islamic law. It has condemned the campaign of the persons who want to defame the Islamic institution of marriage alleging it as an incidnet of sale. Imarate Sharia sends its own men to look after the fulfilment of formalities of marriage in his presence provided the parties or at least one of the parties has sent the application for the same.[14]

There is variation in the decisions (of Imarat) of the cases having similar issues.[15] It might be the cause of not following the case law of its own. However it gives a bad signal on the Imarat's part. We see that there is legislation[16] all over the world extending the age of majority but Imarat has not charged its view. About witnesses in the marriage, the Imarat has developed a good trend of witnesses of locality of weaker sex. However in India under certain circumstances the witnesses of non-Muslims may have

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[14] As Justice Mitter had held in *Subrun Nisa V. Subdu Shaikh AIR 1934 Cal.*
[15] Please see chapter 3 supra.
[16] Please see chapter 3 supra.

been accepted. Because marriage is an essential incident of the social life. It should not be avoided due to lake of proper witnesses. In *Hurmate Musahirat* prohibition is accepted even where there is no marriage. However the Safeyee view seems good as it considers prohibition (*hurmat*) only after marriage and not on touching. The opinion of Hanafi school is really hard and Imarate Sharia has adopted this view, which may be looked afresh. As a whole the campaign of the Imarat to get the marriage solemnized in accordance with Islamic principles is very effective and worth appreciation.

6. DEVELOPMENT OF DOWER AND IMARATE SHARIA:

Dower is a necessary gift from the husband to the wife. In the Holy Quran and Traditions there is no fixed scale of it. It is the right of the wife and she can demand it any time from her husband. But in India the concept of dower debt is prevailing which is alien to Islam. Imarate Sharia seems failed in providing it the Islamic colour. Rather it has flown with the wind of the tradition in such manner that it has held that dower cannot be demanded unless there is dissolution of marriage.

In *Mehrun Nisa's case*[17] the defendant's pronouncement of divorce was proved.But that was *bidai* form of divorce. Meanwhile the amicable solution ordained by the Almighty Allah[18] was bypassed. It must have been condemned by the Qazi. The defendant went to the plaintiff's house to bring her with him to her marital home. She refused to go with him,upon which the defendant pronounced the divorce twice in the same sitting. When she

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17 73-13226-1410 AH

18 See Supra notes 55 - 63 ch. 4

demanded her dowry property along with dower, the defendant refused saying that his gift should be returned first, after wards he will give her dowry and dower. Upon this the Qazi has cited an Arabic text of *Fatwa Khania,* without the translation and held that what husband gives to his wife is her property and the husband has no claim over that. With due respect it is submitted that the Qazi should have cited verse 229 of sura 2[19]. Thus in this way the opinion of advocates[20] and *Ulema*[21] is corroborated that the Shriat Court is not specific in applying or citing the primary sources of Islamic law.

In the case of *Naseem Haider*[22] the defendent's divorce was made on 14th of September 1998 by way of trip-le divorce. After the waiting period the dower Rs. 21 thousands were paid through the Imarate Sharia. In *Nuzhat Jahan V. Tufail Ahmad, Fahimul Haq V. Maryam Khatoon, Sohrab Qureshi V. Noshaba Khatoon, Sebun Nisa V. Md. Shahadat Husain. Zinal Ara V. Nisar Ali, Mahrun Nisa V. Md. Akhtar and Zeenat Parveen V. Md. Irfan,* the similar orders were made by Imarate Sharia.

Thus we see that there is a general trend of payment of dower after divorce, dissolution which is not appreciable in Islam.

In *Kariman's* case,[23] the marriage was dissolved by the Qazi due to assault of the defendant. The Qazi had ordered the payment of dower debt after dissolution. Here also the book *Hedaya,Moinul Hukkam* and *Fiqah Maliki* were referred instead of primary sources. It is submitted that the dower

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[19] See note 56 chapter 4 supra
[20] See Appendix
[21] See Appendix
[22] 113 - 16788-14119 AH.
[23] 248-15931-1416 AH

is not a debt as has also been held in the cases of *Nuzhat Jahan , Sibun Nisa, Zinat Ara, Mahrun Nisa, Syed Hyder Rizvi v. Shahidi Nikhat (16-10295-1402AH)* and *Bibi Mahjubur v. Ehsan Ahmad* (104-16534-1418 AH) but that is right of the wife. Imarate Sharia is a charitable institute and there is no provision of salary and there is lack of adequate staff to help Qazi. It might be the cause of certain difficulties and deviations.

In *Zarina Khatoon V.. Mohd. Siddique*[24] the plaintiff had demanded her dower money. She also alleged that her divorce was completed by her husband. Rejecting her witnesses as being her off springs, the Qazi had held that the order of the payment of dower may be made only after the dissolution of marriage. He had also referred two books *Bahrur Raiq* and *Durre Mukhtar* but not the original sources. With humble submission it may be said that dower is the property of the wife and she can demand that any time and the Qazi's decision was erroneous. In a case where there were no proper witnesses about quantum of dower the Qazi had held that the statement of husband will be accepted. Even where the quantum of proper dower was known, husband's saying was relied. Thus it is clear that the nature of dower as considered by Imrate Sharia is in accordance with Islamic law. However the quantum of dower is in consonance with Hanafi view. The term dower debt is the result of the local tradition and accepted by the Imarat in such a way that at one place the Qazi had held that the dower may be demanded only on dissolution of marriage, which seems enormous and has gained notoriety of customary law.

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[24] Also see *Fahmida Khatoon V. Nayarul Haque*, 148-11894-1406 AH.

7.DEVELOPMENT OF PROVISIONS OF DIVORCE AND IMARATE SHARIA:

In *Rasulan V. Abdus Subhan*[25] the plaintiff was married 14 years before the petition of divorce. She alleged the cruelty on the part of the husband but she could not prove. Again she alleged in the revision petition that the plaintiff had divorced her, so he had lost the right of cohabitation. Seeing the defiance of the plaintiff the Qazi allowed the defendant to go to the Regular Court and issued a decree in the name of the Muslims not to marry with the plaintiff. In the present case the plaintiff should have been given the right to use *Khula* instead of compelling her to join the husband who was already having the 2nd wife. In the plaint she told that she would commit suicide if she was forced to join the husband. In the similar circumstance Caliph Umar (Raz) ordered a husband to divorce his wife. More-over the Qazi has hinted to go to the Traditional Courts, which is not in accordance with the Islamic principles. The Qazi has also not used the original sources to decide the issues.

In *Saleeman v. Shaikh Shafat*[26] the plaintiff married with defendant in the age of 7 years. When she was of 11 or 12 years of age she got a religious divorce (*fatwa*) from a mufti for her 2nd marriage when her husband was unknown for four years and she got a letter also about his death. After second marriage a girl child was born to her. In the mean time the defendant appeared but did not demand her wife and after few months again disappeared for 16 years. When she asked the *fatwa* from the Imarat, the

[25] 30-334-1349 AH.

Imarat considered it a fit case to refer to the Qazi and Qazi held that the 2nd marriage was legal as that was made on the death report of one person which is enough to prove the same as per rule of *Raddul Mukhtar* Vol. II, p. 616 and the Holy Quran S 28 A 22, 125; S 4 A 94. But the appearance of the 1st husband had annulled the 2nd marriage. Since the 1st husband was disappeared for 16 years the marriage with the plaintiff was dissolved. So she would pass the *Iddat* simultaneously. However the Qazi held that the offspring of the plaintiff is legitimate.

It is submitted that the marriage of the plaintiff was made in the age of 7 years when she obtained the religious decree of death of her husband that was the time of her majority. There may be implied option of puberty. The most amazing thing is that the marriage is one of the basic needs of the human. The woman who lived with her 2nd husband for 18 years is not allowed to live with him due to the appearance of the 1st husband who even did not demand the wife and again disappeared for 16 years. For a disappeared person a family is being separated which seems hard. Moreover the plea of the wife that Umar (Raz) orderd for return to the first husband, who was disappeared either wife or dower. But there is no demand from (disappeared) first husband. The Qazi should have considered the view of Caliph Umar. The plea of the plaintiff that Ahle Hadith consider the 2nd marriage legal was not accepted. The Qazi rejected the plea saying that Caliph Umar had taken back his view and Ahle Hadith are not amongst righteous. The *fatwa* of Mufti Kifayatullah was also rejected by the Qazi. Thus we see that the decision of the Qazi is neither having consideration of

[26] 7-270-1348 AH.

public policy nor equity and justice especially when there is provision of continuation of marriage in other schools of thought. The Qazi is not supposed to be prejudice to any school to such an extent that the justice be affected. The consideration of circumstances and a sense to the peculiar situations is must. The rules of pick and choose or patch work (*talfique* and *takhayyeer*) should have been adopted in this case. In *Bibi Safina V. Mohd. Israel*[27] the Qazi has decided the matter very logically. Although there was no reference of original source but the decision is worth appreciation. In the Holy Quran in the similar matter, the decision of the Prophet Daud (AS) has been appreciated. In this case parties were not in favour of divorce but the householders of the plaintiff forced the defendant to pronounce the divorce. The matter was so analysed and issues were decided in such a manner that no rule of schools were broken and the Islamic principle was implemented.

In *Mohammad Qamruddin V.Majida Khatoon*[28] the Qazi adopted the Islamic method of arbitration and negotiation to continue the marital tie but in the last the parties decided to be separated to which Qazi said a matter of piety.

In *Fatima* and *Zohra* V. *Khuda Bakhsh* the Qazi started the proceeding itself saying that it is matter of *haququllah* and Qazi is under duty to protect this. In this case the statement of the defendant that he accepted before *panchayat* that he had divorced only one of his wives, was considered as confession and accepted by Qazi in such a way that the matter could not be refused by the defendant. The witnesses were also improperly accepted who did not see the defendant pronouncing the divorce but they heard from behind

[27] For detail please see Appendix 1.

the wall. However as it has been discussed with reference of the *Fatawa Qazi Khan* that the statement of the husband will be relied upon if he divorced the wives and later says that he wanted to divorce any particular wife. The acceptance of improper witnesses is also not praise worthy. If any thing is prejudiced then the corroboration of that thing is very easy. But the decision must be just and also appeared to be just. The confession is not made before the Qazi. Qazi must accept the statement only when that is made before him and not anywhere else. In *Parveen* V. *Mirza Tahir Baig* the defendant told the plaintiff that if she would not leave the marital home, he would leave her (*Jawab Dedega*).On her non compliances he told that okay he had left her; one; two and three. But the Qazi has taken two grounds to continue the marital knot. First, there was only one male witness and one female. The other male witness is little bit deviating from the two witnesses so there is lack of proper witnesses to establish the case. Second, the defendant was in the abnormal condition and his statement was not to be relied due to mental conditions. However it could have been held *bidai*. Moreover being in one sitting its effect would have been of one divorce. Muslim personal law board has also taken this matter at its agenda and in near future it is going to be debated for consensus[29].

But in *Fahimul Haque* V. *Maryam Khatoon*[30] the plea of the plaintiff that he was abnormal at the time of divorcing the defendant thrice,was rejected and the marriage was found broken. All this was due to the acceptance of *bidai* form of divorce. If the true Islamic system of divorce

[28] Case No. 272/10203/1401 AH.
[29] The HindustanTimes 13 September p.1, 2000

were applied this type of problem would not have arisen.[31] In Mohammad *Saleem* V. *Hasina* the Qazi rejected the plea of the defendant that the plaintiff had pronounced triple divorce to her. The acceptance of single pronouncement was considered single *rajai talaque*. The Qazi held that the continuance of marriage is a basic thing. To break it, there is need of proper witnesses, which was not found in the present case.

In this case the real spirit of the institution of marriage is described. There is also a basic principle of the Islamic jurisprudence that any established thing can not be discredited without the proper witnesses and proof.

In *Sibun Nisa's* case the plaintiff was considered divorced thrice only due to the acceptance of the defendant that plaintiff's mother told him that he had divorced three to the plaintiff and he reacted affirmatively. The wording of the defendant was "if you say like this then okay you should bring your dowry from my home". The Qazi considers this statement as acceptance of *talaque*. He (defendant) says that he reacted in this way to show his anger and not acceptance of divorce but Qazi rejected his plea and marriage was held broken, which seems hard as it is in contravention with the true Islamic spirit.

8. DEVELOPMENT OF PROVISIONS OF DISSOLUTION AND IMARATE SHARIA:

[30] Case No. 55 - 16185 - 1417 AH.
[31] Also see *Sohrat Qureshi V. Naushaba Khatoon*, 51, 16181, 1417 AH.

In dissolution of marriage the true Islamic spirit is adopted by Imrate Sharia. In case of a husbands missing, his wife is granted decree of dissolution on the complaint of non-provision of maintenance. On this ground there is requirement of two months period for dissolution. In this way 4 years waiting is not needed. In Bibi *Ruqayya* V. *Mujib Alam*[32], *Shahina Perveen* V. *Javed Nehal*[33] and *Bibi Mumtaz* V. *Mohammad Naushad*[34], the marriage was dissolved without giving further time because there was maintenance problem also. Not only maintenance but also where there is apprehension of immoral act, the marriage will be dissolved without any period of waiting. Thus it is in consonance with the true Islamic spirit. Even in the presence of the husband the inability to maintain his wife will enable her to obtain decree of dissolution. In *Zahera Khtoon* V. *Md. Shibli* the Qazi dissolved the marriage on this ground. This thing is also in accordance with the principle of Islamic law although Hanafi law does not permit it but Imarate Sharia has taken a bold step in this regard which is appreciable.[35]

In the case of impotence of the husband the Imarat has rightly taken the view that the right to have marital intercourse is a basic right of the wife and in case of impotence she is denied of her basic right. So she will have right to obtain decree of dissolution.

In *Khairun Nisa's* case the time given to the husband by the arbiters was treated enough and no more time was given for treatment. Thus in this way Imarate Sharia has impliedly accepted the authority. The marriage

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[32] 391 - 15159- 1414 AH.
[33] 340 - 15609 - 1415 AH.
[34] 101 - 15370 - 1415 AH.
[35] Bibi Fatima case see Appendix and also *Shahin Fatima V. Abdul Majid Iftekhari*..

is dissolved although Hanafi law does not permit it. Where the husband is neglecting without financial problem the marriage is dissolved at once. Really it is appreciable thing is Islam. The Holy Quran commands that the wives must not be kept in marriage to make excesses.[36] In case the wife is neglected from marital intercourse, she has right to obtain decree of divorce. Although Hanafi law does not permit it but Imarate Shraria has again upheld the Quranic dicta of arbiters. In other words if arbiters decide to dissolve the marriage that is also possible. It is really a good sign. Whenever there is no *Imarat,* Muslims are under duty to opt this way. It will help in providing easy justice to the weaker sex living in the remote areas or in odd circumstances.

9.SERVICES OF IMARATE SHARIA:

Imarate Sharia does not charge any thing from the litigants. There is also provision of soli hearing of the cases i.e. if any of the parties is unable to reach to the Qazi the Ameer will,on request of the parties, order to make hearing of the parties and the witnesses at their residence or in their locality. This is very good thing and it is of course in consonance with the Islamic rule. The time is also taken less. This is another rule of Islam. Once the Prophet told his companions that in the previous books Allah commanded the rules of moral values like, "O egoist king! I have not assigned you the throne to collect the wealth. But your duty was to provide the solution of the pains of the suppressed (and sufferers). Because their voice is very dear to Me and that reaches Me within no time." Thus the voice of the sufferers must be heard within a reasonable time, which is done by Imarate Sharia. The

[36] Also see *Md. Sarfuddin v. Nikhat Sultana, Nuzhat Jahan v. Tufail Ahmad* infra Appendix.

satisfaction is also provided to the persons. So there is no trend[37] of appeal against the decision of the Qazi either before the *Ameer* or before the Civil Courts.

Great thinker Allama Iqbal syas - "Juda Ho Din Siyasat Se to Rah Jati Hai Changezi" (If there is no religion in politics there is nothing but barbarism). However it is not seen that Imarat is taking part in politics as it was doing previously. Any way it is not taking part in the politics due to its own limitations.

Thus we reach at the conclusion that to some extent the Imarat is successful in developing the personal law. But it has also adopted the same old rule of *taqlid* (following only). Although at some places it has taken bold steps to prevail the Islamic ideology.

Imarate Sharia has done enormous works in riot-affected areas, in tide affected are as and earth quake affected areas. It has also been helping widows and patients. It has provided certain other services to the Muslims. It has established several educational institutions.The technical institutions set up by it are not truly Islamic in their contents. There is no moral or religious instruction in effective way in them.Maulana Ashraf AliThanvi in his book *Islahe Maashra*, written that any knowledge at the cost of the religious values is prohibited (*haram*).In the board of *Wifaqul Madaris* the syllabi do not contain enough of the Quran and Hadith as it covers the *fiqh*. When there was inauguration of an educational institution of Imarate Sharia it was made by recitation of *Tanvirul Absar* a book of Hanafi School.However it has been

[37] It is negligible as it is less than one percent.

has been the tradition of the Muslims to inaugurate any thing by recitation of the Holy Quran.

It is said that in Islam there is no difference between religion and politics. It might be this reason, which had encouraged the Imarate Sharia to participate in the politics actively. But due to change of the circumstances its role is now passive in the politics.

10. IS IMARATE SHARIA REALLY AN IMARAT :

Discussion made in Chapter one makes it clear that there is need of an Ameer for Muslims. Now the question arises, is Imarate Sharia an Imarat. The *ayat* of the Holy Quran that follow Allah and His Prophet and those charged amongst you says that those who are charged and does not say to follow the vice of the charged. If it is accepted that to following the vice is also to be included in following the head (charged, Ameer, *faqih*) but one is to agree that the head must not be in obeyance. If he is out of reach and there is difference between incharge and wards they cannot resolve their differences according to the Quran and Hadith as ordained in the same verse of the Holy Quran. Moreover the person, who gets instruction from any source, which according to the instructed is included in the term Ameer the instructed cannot be Ameer. However he may be vice (*nayab*). So if Imarate Sharia follows any body order it may not be Imarat. It may be called rather *Neyabate* Sharia. Where a particular person has been selected for Imarat, the Imarat will be named with him. So, as soon as Imarate Sharia follows any of the four schools of Sunnis, it will be called, Neyabate - Hanafia / Malikia / Shafeyeea / Hambalia but not Sharia. Because any of the four schools are not headed by the respective successors. If it is said that there are certain matters

in which the founders of the schools have held something which is in accordance with Islam. But many of the modern scholars, followers of primary sources, Ahle Hadith and Shias say that no generation can claim the monopoly of wisdom. An analogy may be suitable for any particular time but the same may be obsolete in future. The sayings of the Prophet contains the suitability for ever, as that is based upon revelations.

Let me discuss the practical aspect of Imarate Sharia. In the book 'Quza Ke Chand Ahsam Masayal' Maulana Abdus Samad Rahmani[38], replying the questions regarding:

1. Impotence of the Husband[39]
2. Protection to the wife[40]
3. Option of puberty[41]
4. Procedure of evidence and litigation[42]

Mostly questions were replied citing fiqh books instead of primary sources[43] of Islamic Law. Some scholars are of the view that the persons, who were never Ameer, may not guide the Ameer or after his death his wordings may not be guidance for the Ameer[44]. In the book of Rehmani 'Kefabul Faskh Wal Tafriq' it is written that Imarate Sharia's guidance for

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[38] Ed. Mohd Shafi (Patna : Imarate Sharia. 1990) II[illegible]d Ed.

[39] Ibid p. 8-12

[40] Ibid p. 13-16

[41] Ibid p. 17-41

[42] Ibid. 25- 29, 50-99

[43] Only p. 13,14, 15, 23-27 contains the either verses of Holy Quran or story of companions of the Prophet (SAW) in which two verses in part instead of full and its explanation are quoted which is 0.5% of the discussion. However, the story of the companions cited in the *Shami*, a book of *fiqh* Hanafi and some story without reference is 6% only in the rest.

[44] Maulana Abdul Moid's opinion who also represents Ahle Hadith opinion

dissolution of marriage is the guidance that is provided by the four schools of the Sunni Law[45]. In this way it may be said that Imarate Sharia is *Neyabate* Sharia rather than Imarate Sharia. However the response of the workers of the Imarate Sharia(that they have developed their own systems in the light of Quran & Hadith and Hyat is the source of guidance)is rebutting the above mentioned things and in this way its authenticity can not be doubted. But as soon as it is guided by any source other than Quran & Hadith the *Neyabat* (vice ship) rather than Imarat will eclipse it.

However, the aims and objectives described by it are as follows[46]:

1. To provide the Sharia Organisation (*Imarat*) so that the Muslim may lead the Islamic life.
2. To implement the Sharia especially in *Ibadat* and personal Law matters.
3. To make endevour to develop the capability to implement the Sharia.
4. To protect the interest of Muslim.
5. To unite the Muslims on the basis of *Tauhid* and *Resalat* barring the Schools of thoughts.
6. To provide the guidance to the Muslims in the field of education and economy in the light of Sharia.
7. To establish the institute for betterment and services of humanity.
8. To protect the religious rights of Muslims and to develop the harmony amongst the other religious communities, so that the real fraternity can be establish.

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[45] It may also been seen at p. 44-51, 53, 57, 58, 63, 64, 73, 79, 80, 85-91, 94, 100 & 105. Where it has been clearly stated that Qazi is to follow the instruction of four schools

[46] Imarate Sharia 'Imarate Sharia Bihar and Orissa' (Patna : Imarate Sharia, 1992) p. 7-8

If it is established for the above mentioned objectives it is really Imarat. However, it may have incorporated the verses of the Holy Quran where Almighty Allah has guided the *Ameer*.

"(They are) those who,
If We establish them
In the land, establish
Regular prayer and give
Zakat, enjoin
The right and forbid wrong:
With Allah rests the end
(And decision) of (all) affairs."

CONCLUSIONS AND SUGGESTIONS

پھول کی پتی سے کٹ سکتا ہے ہیرے کا جگر
مردناداں پر کلام نرم ونازک بے اثر

علامہ اقبال از بھرتری ھری

"It is possible to cut diamond by leaf of roses but it is impossible that idiots be convinced by reasoned arguments"

CONCLUSIONS AND SUGGESTIONS

As the topic shows, the study incorporates three things:

(I) Development of Muslim Personal Law,

(II) Imarate Sharia, and the

(III) Contribution of Imarate Sharia

For the sake of convenience some important questions[1] were raised. **Chapter 1st** dealt first among those i.e. whether an *Imarat* is needed for Muslims to lead the Islamic life? For this, several verses of Holy Quran were quoted. On basis thereof the conclusion is drawn that in the Quran much stress has been laid upon this. Besides this even the Traditions of Prophet Mohammad (SAW) are also to the same effect. The religious scholars have written much about the establishment of *Imarat*. Right from the companions of the Prophet (SAW) down to the 20th century every important religious scholar has decreed to establish it. Not only these but the study incorporates the historical development of the institution. The Indian history is witness that during the British regime several strong movements emerged to establish

[1] 1) Is an Imarat needed for Muslims to lead the Islamic life? 2)Is Imarate Sharia a fit case to be cited as an example of Imarat? 3)Has Imarate Sharia done enormous works in developing, strengthening and implementing the Muslim Personal Law? 4)Are there provisions of alternative settlement in India? 5)Is Court fee charged in the Indian legal system excessive? 6)Has Imarate Sharia provided the alternative remedy? 7)Is the alternative, provided by Imarat, effective, less time consuming and upto the satisfaction of the persons concerned? 8)Is the institution of Quza necessary to dissolve the marriage? 9)Is the future of Imarate Sharia bright in India?

Khilafat, which was dissolved by the British Government in Turkey. Upon which Allama Iqbal the great poet, philosopher and eminent Islamic scholar, consoled Mulsims :

"Hazaron saal nargis apne be noori pe roti hai,
Bahut mushkil se hota hai chaman main didawar paida.
Agar Osmanion pe kohe gham toota to kya gham hai,
Key khoone sad hazar anjum se hoti hai sehar paida".

Not only Islamic scholars but the Britishers have also recognized that this institution is inevitable for Muslims. For this the view of W.W. Hunter is incorporated in the study and after detail discussion it is established that Imarat is really a need for Muslims. The questionnaire[2], filled up by Islamic scholars also shows that Muslims are unanimous over this. Thus it can be said that the first question is positively proved. The 2nd question was that 'Is Imarate Sharia a fit case to be cited as an example of Imarat?' For this the qualifications of Ameer described in religious books were discussed. Simultaneously, the qualifications laid down for *Ameer* in Imarate Sharia, under sections six to ten were analysed and compared. At the same time *Ulema* were also consulted through the questionnaire and opinionnaire methods. In this way it is concluded that opinion of *Ulema* is divided. 50% of them are of the view that Imarate Sharia is a fit case to be cited as an example. However, some minor deviations are seen in the constitution of Imarat as compared to the original source book of Islam regarding qualifications of *Ameer*.

[2] For detail please see chapter 8 supra and appendix.

Chapter 2nd dealt with the question of alternative system in India. After discussion it is found that it is existed theoretically as well as practically. It seems that persons are fed up with the Regular Courts and preferred the alternatives in India and abroad. The number of cases has been referred in this chapter that Allahabad High Court has held to exhaust the alternative remedy rather than exercising its writ jurisdictions given in Article 226. Thus this question is positively replied.

Chapters 3rd-6th along with **Chapter 9th** dealt the third question , 'has Imarate Sharia done enormous works in developing and consolidating the Muslim Personal Law? It can be said that it has taken some bold steps especially in the matter of dissolution of marriage. However it has tried to establish several times that it is a Hanafi organisation, which is not appreciable. In most of the cases, it does not refer the original sources for which the *Ulema* and advocates are much critics. Wherever the books are referred, the Arabic text is written in the judgments. It is influenced by local traditions also due to which the term like dower debt is used. In *Bidai* form of divorce, its practice is not according to the Holy Quran and *Hadith*[3]. But where it has got the support of other *Hanafi Alim*, it has tried to establish the *Sharia* view e.g. in the matter of dissolution of marriage the book *Hilatun Najiza* of Ashraf Ali Thanvi[4] has supported the dissolution of marriage, on the request of wife. So it has adopted the liberal view of dissolution. But at so many places it has tried to show that where-ever there is provision of Hanafi Law that should prevail. Thus we reach at the conclusion that Imarat has done

[3] As analysed by Maulana Abdul Moid (Medina University)

[4] Ashraf Ali Thanvi,' *Hilatun Najiza*'(Deoband:K.K.Azizia,1355AH)

some work to develop and consolidate the Personal Law but the provisions of Schools of thought are more sacred to it. However no decision has been made which is beyond the original sources or contrary to the views of four Imams (*Aimae Arba*). However the rule of separation of power is not strictly followed by it. Some times the Qazi has deviated from the rules of Quza and issued the decree like *Mufti*.However *Fatawa Imarate Sharia* differenciates between two.

Chapter 7th talks about the charges of the court in the name of court fee. It is found that the collection of court fee is not only enough to meet out the court expenses but that is also a good source of income. As it has been discussed in chapter 2, it is really a matter of shame that the colonial lords who did not bothered to charge even to provide justice to the wronged, this system is still continued in a welfare state like ours. Several persons have suggested several measures to eradicate it. Even the Britishers opposed the court fee system but being followed by our welfare state, which seems erroneous. In this way it can be said that this question is also replied positively.

The question, has Imarate Sharia provided an effective, less time consuming and up to the satisfactions of the Muslim masses? The answer is yes. The Additional District Judge, Godda, writes in a judgment that a woman is ready to be hanged instead of defying the orders of the Qazi of Imarate Sharia. It shows as to how sacred the judgment of the Qazi is believed. It is this, which has made the Imarat effective otherwise it has got no agency to get its decisions implemented. About time the chart of the cases in chapter 7 shows that one case is decided in the Shariat Court in an average of 211 days

while the average of the cases of Patna High Court is 3069 days. Thus the time taken by Imarate sharia for one case is 14.542 times less than Patna High Court.

The question 'Is the institution of Quza necessary for dissolution of marriage'? The answer as has been given in chapter 7th is yes. Thus this question is also positively answered. **Chapter 7th also** deals with the question, 'has Imarat provided the alternative remedy? The answer is supported by a case[5] where the Qazi dissolve the marriage and the matter was brought before the Court where the woman, whose marriage was dissolved stated that after the decision of Qazi she can't join her husband ,defying the order of Qazi, even if she is hanged.

Thus it is clear that the Imarat has provided the alternative remedy and according to the District Judge Godda, Bihar, it is the highest authority in the matter of matrimonial matters and of divorce and dissolution.

Chapter 8th deals with the question, 'whether the future of Imarate Sharia is bright? The answer is not without condition. If it follows the principles of unity, sacrifice and service as it has been doing till now really its future is bright. But the moment it indulges itself in the four walls of different schools of thought, territorial boundaries and derogatory remarks for the followers of primary sources its future will be dark.

After the discussion I would like to suggest the following things, which may be treated as cvux of the study.

[5] See chapter 2 supra.

SUGGESTIONS:

1. The establishment of *Imarat* should be expanded to all India level. For this (for *Imarat*) a movement is needed.

2. Imarate Sharia should unite the Muslims of Bihar under its banner. The parallel *Imarats* for Ahle Hadith and Baraelvis are not in accordance with Islamic principles of *Imarat*.

3. It should be above the different schools of thoughts. It should develop its own principles, in the light of the Holy Quran and Traditions of the Prophet (SAW).

4. The concept of dower debt should not be encouraged. It should be in conformity with the Islamic principles of dower.

5. The practice of *talaqul bidat* should be banned. The triple divorce must be treated one if made in the same sitting, as there was practice in the times of the Prophet (SAW) and Caliph Abu Baker (Raz). Imarate Sharia should actively support the causes of Personal Law esp. in developing and strengthening it as AIMPLB is to discuss on 29.10 2000, how to avoid *bidai* divorce.

6. The dower must be paid in relation to its purchasing power at the time of its fixaton. There should be consensus amongst *Ulema* that the fixation of dower is in terms of its purchasing value rather than its face value.

7. In deciding the cases, the Quza wing of Imarate Sharia must mention the verses of the Holy Quran and authentic Traditions. If there are

contradictory Traditions (as some *Ulema* say that there are) then there should be mention as to why any Tradition is preferred.

8. In mentioning the scholar's book the Urdu translation and explanation must be incorporated in the judgment along with the primary sources of Islamic law.

9. In deciding the issues the reference of previous cases may be made so that a unanimity be maintained.

10. The cases must be published preferably in Hindi and English also so that the Courts may also use it.

11. The Government should consider Imarate Sharia as an alternative forum under D.M.M. Act 1939 and Shariat Application Act 1937. Its decision be implemented and be recognised at par with the High Court. However the appeal may be made in the High Court for review.

12. The Imarat must review the syllabies of its educational board. That must not be in contrary to the institution of *Imarat*.

APPENDICES

1. APPENDIX - I; CASES OF IMARATE SHARIA PUBLISHED IN LEADING MAGAZINES:

(1). MRS. TAHRUN NISA V. MANZOOR KHAN

(Hon'ble Mujahidul Islam Sb. Qasmi Qazi)

The plaintiff stated that she was married with the defendant five years before petition of dissolution. The 1st two years of marriage was happy. The 3rd year of the marriage was very bitter. She was often beaten by the defendant and his relatives. Once she was seriously injured and in that condition asked to pass the night in the open yard of the marital home. Although the water was thrown over her and beaten so severely that bleeding was made from many parts of the body, no one did care that the body may have been affected from cold waves. In the meantime they chalked a programme to cut her hairs and ride on the ass to defame her in the morning. Due to fear of defamation and injuries and due to cold waves, she left the marital house in the late night.

That the defendant made a F.I.R. of her leaving marital home. She also approached to the police from where she was sent for the medical assistance where it was known that her leg was fractured. In this crime the defendant and one of his relatives were punished for three months.

That from that date the defendant neither has come to meet her nor fulfilled his marital obligations. So she requested that her marriage should be dissolved with the defendant.

That the hearing was made and the witnesses proved the plaintiff's allegations.

That the defendant inspite of the notice of hearing did not attend the same and thus accepted the allegations and had nothing to say in his defence.

That the plaintiff was subjected to excesses of the defendant and unable to have the marital rights from him. So her prayer of dissolution was reasonable and was pleased to dissolve her marriage from the defendant. (Petition was Accepted)

(2). RAFEA KHATOON V. ABDUS SAMI

In this case the Qazi observed:

That the marriage was made between the plaintiff and defendant and later on the plaintiff wanted to get the marriage dissolved on the ground of inequality. The plaintiff said that the defendant did not belong to her caste and his caste was lower in status than her in society. Due to which her prestige and the prestige of her parents was lowered in the estimation of the people.

That the plaintiff said that she belongs to the Syed caste while the defendant was of Kalal caste or Iraqi caste. For this she presented three witnesses, all of them said that they have heard that the defendant was not

of Syed caste. The exact source was not known to the witnesses as to why the defendant be treated as lower caste person. Before the marriage, there was no enquiry about the caste from any quarter.

That the defendant said that he belong to the Shaikh Siddiqui family and given a detail list of his family members comprising of ascendants and descendents.

That the plaintiff also said that the defendant was drinker and acted in drama clubs and theatre, which was also the matter of degradation for the plaintiff. To establish that the plaintiff presented three hearsay witnesses. Only the eyewitnesses were able to prove the participation of theatre by the defendant. However the plaintiff accepted that the defendant had indulged in drinking and acting in drama club after the marriage.

That the witnesses of the plaintiff were hearsay evidences, which was not enough to prove the ground. The leneage was not known to the plaintiff and her witnesses. Moreover, once they had entered into marital contract in which there was no misrepresentation or fraud or any condition, the marriage would be final. Even the leneage can not be the sole ground of dissolution as the leneage in the non Arab territory is not a ground of dissolution. Thus, this point was not considered. The leneage of the plaintiff itself could not be proved beyond doubt.

That thc plea of 'God fearing' (*taqwa*) of the plaintiff and thc bad society of the defendant was not acceptable. The plaintiff herself said that the bad society and drinking was started by the defendant after marriage. Firstly these allegations could not be proved Secondly if there

was proof the condition of equality in 'God fearing' is to be seen at the time of marriage and not after wards. The defendant was not involved in alleged things alleged before marriage. Thus those pleas were rejected.

That the only proof was available against the defendant that he habitually participated the drama clubs and theatres. But that thing could not be the ground for dissolution. Because the plaintiff was herself watching the dramas and theatres. The wife who watches the dramas and theatres can not take the plea of inequality of her husband's acting in the plays. Thus this ground was also rejected.

That the real cause of the divorce was misunderstanding in dowry amount. The defendant was engineering student at the time of marriage. It was settled between the parties that the defendant would be maintained by the plaintiff's father if marriage was solemnized. But the maintenance amount was less offered. Consequently the study of the defendant was discontinued and the dream of future engineer was flown with wind.

That the Qazi warned against dowry and the marriage was not dissolved. (Petition was rejected)

(3). ALEEMA KHATOON V. MOHD. IDRIS

The court held -

That the plaintiff gave an application for the dissolution of her marriage on the grounds of option of puberty and inequality.The plaintiff said that the defendant had wrongly told his leneage that he was

Syed. It was known after some time of the marriage that the defendant was not of Syed caste. So her marriage should be dissolved on the above grounds.

That the plaintiff presented three witnesses and told that her father had heard from an old lady who was residing in the vicinity of the plaintiff who said that the defendant was not the real son of Mir Hasan. Hearing this, the plaintiff's father moved towards Bankatva, a place where dedendant's land existed. There also he was told that the defendant was not the son of Mir Hasan. He was son of Khan Sahab. But no body knew who was Khan Sahab.The plaintiff father came to the defendant and said that he was misled in the leneage of defendant.The defendant's father became shy. The matter was further proceeded and Mir Hasan accepted in the presence of Haji Abdul Hamid and Hafiz Noorul Ain that he misled the plaintiff. The witnesses said that in their presence Mir Shahadat told both of them (Haji Abdul Hamid and Hafiz Noorul Ain) that the defendant was not the son of Mir Hasan. Again, Hamid and Ain told them the fact. Thus,that was hearsay evidence and confession could not be proved.The statement of an old lady, persons of Bankatua and Mir Shahadat cannot be the ground of non-establishment of leneage.

That there is difference amongst the Hanafi scholar whether the woman can take the plea for dissolution. *Durre Mukhtar* contains that she can not take plea. Only her guardians are having the right to take the plea of leneage. However *Raddul Mukhtar* says that if marriage is made by non-guardians, she has right of dissolution. In the same way, the guardians,

if profligators, she has right of dissolution on the ground of leneage. However Imam Abu Hanifa (Rah) says that both wife and her guardian have right of dissolution while his disciples say that only wife has this right. However scholars are unanimous that where a misleading statement has been given by the husband about leneage, the wife as well as her guardians have right of dissolution. Thus the demand of dissolution was made on strong points.

That the prayer of option of puberty was rejected as the marriage had been made by the father. The prayer of dissolution on ground of misleading statement of the defendant could not be proved. So that prayer was also rejected.

That the defendant's father had brought three witnesses who said that Mir Hasan married with the mother of the defendant when she was virgin. The defendant was the real son of Mir Hasan. So he was brought up by him.

That the peition of the plaintiff was worth rejection and the Qazi did not grant the releaf to the plaintiff. The prayer of the defendant for *rukhsati* was accepted. (Peition was rejected)

(4). MEHMOOD V. AZIZA KHATOON

In this case the Qazi held -

That the appellant had made appeal against the judgment of the Qazi. The appellant stated that the witnesses presented by the defendant (plaintiff previously) were concocted and false. They were not of the

vicinity where the matter occurred. Some witnesses were relatives of the defendant while others were friends. In the judgment there was mention of use of todi by the appellant while the fact of leaving the same was not mentioned. The judgment contains the saying of the defendant that the appellant snatched the ornaments, but the reply of the defendant, when there was discussion, was not mentioned. He further said that he was allowed by the arbitrators and *panchas* to taken his wife with him whenever there was chance, because he proved before them that the defendant was not joining him and she had gone to the city to watch *Diwali* and cinema. Moreover two witnesses of the defendant had turned hostile and they were saying the reality. Thus, he never ill-treated in the field of village in the presence of several persons. He only persuaded the defendant to come with him and in that way she was brought by the appellant. In the light of the above the appellant prayed for the cancellation of the order of dissolution.

That the allegations of the appellant could not be proved that the witnesses of the defendant were concocted. The plea of the distant vicinity was also not acceptable as the witnesses of both the parties were unanimous that the place was an open street which was used by entire residents of west side of that village, if they wanted to go outside. Thus it was not right to say that the place of occurrence was not near to the witnesses. Being the common street they might have been present in the street at that time.

That the plea of relation of witnesses and friendship was taken. In this matter *Hedaya* and *Fathul Qadeer* contain a tradition that the

evidence of ascendants for descendents and vis a vis is not acceptable. Again the above books alongwith *Darrul Mukhtar,* narrate that the friends evidence against his friend is acceptable unless their friendship is so fast that they can spend the money of each other without consent. Thus, to say that the witnesses were friends of the defendant was not enough to invalildate the judgment.

That the two witnesses of the defendant - i). Ayub and -ii) Ghuran Thakur said in the appeal that they gave evidence due to relation and neighbourhood. The appellant had failed to establish, whether the relation of Ayyub was ended with defendant's father and neighbourhood of Ghuran Thakur was changed. If that has not happened why did they changed their statements. A person who considered the relation and neighbourhood an impediment in the way of justice, he may be influenced by other means also. If it was said that they were again influenced what would happen. Moreover the scholars have written that if any of the witnesses changes in statement that will be considered before judgment. If the judgment is given the changing in the statement will not affect the validity of judgment. In that case the Ist statement upon which judgment was based would be accepted and the later statement would be considered false.

That the confession of todi use was acceptable while resolution not to use that was to be proved. The evidence that he had not used todi after resolution was not acceptable as the evidence of negative things are not acceptable.

That the ill treatment with the defendant was established while the cinema going and watching of *Diwali* Festival was not proved. The advocate of the appellant himself rejected that plea. The pleas that he proved these two things before the Panchas are only statement. No witness could be brought either in the case or in appeal. The statement that the discussion of the appellant with the defendant, while he compelled her and snatched the ornaments was not mentioned was erroneous. There was discussion over that. The statement that he took the defendant by persuading her could not be proved. He made excess over the defendant. He used force against her and in the field he dragged the defendant was proved.

Thus the pleas of the appellant were worth rejection and the Qazi maintained the order of previous judgment quashing the appeal.(Appeal was rejected)

(5). IBNE AGHNU MIAN'S CASE

The Qazi held -

That the appellant filed the appeal, against the judgment of dissolution, on the ground of insanity. Since there was capability of marital inter course and maintenance and the appellant was ready for the same the counsel of the appellant said that there was no authority to any body to dissolve the marriage in that circumstances. Moreover the allegation that the appellant used to threat her to kill was also based upon hearsay evidences. When the appellant went to see the defendant he was beaten and denied the *rukhsati* of his legal wife. The defendant herself did not want dissolution. It was her father who pressed her to do that. So the order of

dissolution be taken back and the defendant be ordered to go her marital home.

That the threatening of the appellant to the defendant was not established. It was mere hearsay evidence.

That the beating of defendant's kins to the appellant was not proved. Haji Mumtaz who was presented as witness for that himself denied the allegation.

That the sayings of the appellant that the defandent was ready to join the appellant was not proved. Haji Mumtaz the appellant witness himself said that when he asked the defendant to join marital home, she defied saying that she can not go. When she was enquired about the cause, she told that those things related to the females. There was no benefit to him if she reported. The statement of *charvaha* that he said to the appellant's father that the appellant and defendant used to meet in the field was not accepted as that was stated by Mohd. Siddique that he heard with someone that the *charwaha* said the appellant's father, that was purely hear say statement and could not be proved.

That the above arguments were beating about bush only. The real thing of discussion was considered whether the appellant was still insane. If not then the order could have taken back, if yes the woman was having the right for dissolution.

That the statement of the entire witnesses shown that the appellant was suffering from mental disorder. However there was

observation that the appellant was returned to normalcy. But when the Qazi asked about his marriage and puberty, he said that just one year before he became major there was nightfall once in a week. However before one year he was minor. But when he was asked about his wife he said that he made inter course four years ago and there was fall of semen also. Even the witnesses of the appellant said that there was 6, 7 percent abnormality at the time of hearing of appeal. Since there was objection from the appellant side that the dissolution was made without the medical check up of the appellant, there was fresh check up and one of the reputed *Unani Pathy's* professor gave the report that the appellant was abnormal and and insane. Thus the main ground of dissolution was insanity, which was still continued. So, that plea was rejected. The saying of the appellant's counsel that on insanity the marriage can not be dissolved was not correct. In *Fathul Qadeer, Alamgiri, Mukhtasar, Sahhah, Enaya, Hedaya, Nehaya* and *Zul Afkar* etc. it is written that out of the three views of Hanefis, the view of Imam Muhammad(Rah) was accepted by scholars that the marriage will be dissolved. however these books again contains the time in which Imam Muhammad (Rah) says about one year time and rest two of the Hanafis top brass, Imam Abu Hanifa (Rah) and Imam Yusuf (Rah) say lesser time the period will be considered for old insanity. In old insanity Imam Mohammad (Rah) says that the marriage will be dissolved then and there. However the Qazi reached at the conclusion for instant dissolution as the period passed was more than four months. There the fact was proved that insanity was continued for 8 years. Thus the dissolution demand was reasonable and he

ordered the continuance of dissolution quashing the appeal (Appeal was rejected).

(6). NOOR JAHAN BEGAM V. MOHD. YUNUS

In this case it was held -

That the plaintiff prayed for dissolution of her marriage with defendant as she was married with him 8 years before the petition. In that period the defendant made excesses over her. She was never provided the clothings and sufficient food. Finally she was at her parental home for three years and the defendant in that period failed to fulfill his obligations. She was having a son also who was also denied the maintenance from the defendant.

That two witnesses were produced by the plaintiff. One of them said that he went with plaintiff father to talk the defendant. The father and other relatives of the defendant told that the defendant was jobless and drinker. He failed to provide anything to the plaintiff and his father. Finally it was decided that he will pay some money to his father but failed. After three months again a meeting was held in which it was decided that he will arrange the separate lodging and fooding because his father was lying that he was not giving him maintenance amount. The 2nd witness said entirely different story. There was no corroboration of the sayings of the 1st witness. Thus the case could not be proved due to lack of witnesses.

That the defendant said a different story. He accepted that he had beaten her several times but due to non-compliance of the orders of the

defendant. Any way the action of the defendant was condemnable. But this confession does not fall under the head *Zarbe Mabrah*. But he was ready to maintain her provided she should come and follow him.

That the grounds of the dissolution could not be established even then the fact was clear that there was misunderstanding between the parties. So it was necessary to develop the confidence, love and affection between the parties. For that the defendant was held responsible to maintain at the place of her liking or her parental home. After six months the defendant was held fit to have the *rukhsati* of the plaintiff. If the defendant was failing she was provided the right of dissolution. (The petition was dismissed)

(7). MOHD. NAZIMUDDIN V. FIROZA BANO

The Qazi Court held -

That the plaintiff wanted to consider his pronouncement of divorce ineffective as he made that in such a grave provocation that he was unable to think any thing. He could not remember the number of pronouncement and beaten the defendant without conscience.

That the defendant said that there was some quarrel between her and plaintiff's mother. The plaintiff in the meantime entered in the

house and took his son in the lap. Since the child (son) was in the dirt of urine and latrine, the plaintiff received the dirt and when she was washing the body of her child the plaintiff started throwing water upon her and her children. Seeing this the defendant pronounced the defendant as a mad man. The defendant in return beaten her. The defendant demanded the divorce and the plaintiff pronounced the same.

That the plaintiff's mother said that the plaintiff was in grave provocation. He often happens to be in such condition. Once he was ready to made suicide by jumping in the well. He often made the prey of his provocation to her. But being mother, she was to tolerate that.

That the issue was, whether he was in grave provocation. If so what will happen to his pronouncements. In that regard Ibnul Qayyim has written a thesis that there are three kinds of provocation. First is ordinary second is extra ordinary and the third is grave. In grave provocations the act of the person is done beyond his capacity. To the second provocation some scholars attack that with ordinary provocation while others treat that equal to third one. Anyway in grave provocations the decision making power is affected and influenced by the same.

That the sayings of the person is not to be accepted by the Qazi as to follow the rules of evidence is necessary for him. However of there was clear evidence that the person who was taking the plea of grave provocation was suffering from this lacuna and often seen in provocation, the Qazi might consider the plea of provocation. In case there was no evidence of habitual provocation the grave provocation is to be deduced

from the circumstances and through the witnesses. Thus throwing the water upon children and wife, beating them and showing abnormal activities prove that the mental condition of the plaintiff was not in his control. He was in grave provocation. The remembering of the happenings can not negate the abnormal conditions. Several mad and lunatic persons remember the happenings of their madness. That can not negate their madness.

That the petition was reasonable and acceptable. The Qazi therefore made the order declaring the pronouncement of divorce in effective and the consequence of grave provocation. (The petition was accepted)

(8). BIBI SAFINA V. *MOHD. ISRAEL*

The Qazi held -

That the marriage was held between the parties. In the meantime there was quarrel between two families. The defendant's family members filed a petition for dissolution of the marriage. The defendant was compelled to pronounce the divorce. However there was meeting between the two parties before the divorce. After the divorce the plaintiff joined the house of the defendant and in that way the matter was very complicated. Ordinarily that could have been dismissed but there was complication due to meeting of the parties before the divorce and the divorce itself and finally the joining of marital home by the plaintiff.

That the defendant said that he was not ready to pronounce the divorce. But when he was forced he said "O Allah I am not making the

pronouncement by my will. I am compelled. May the persons face the consequences. I divorce my wife, I divorce my wife, I divorce my wife". Thus three times divorce was pronounced.

That the question arose whether there was intercourse between the parties. If there was, they could not have married without *halala*. If there was no intercourse then in the 1st pronouncement the wife would *bain* and the rest two pronouncements meant nothing. In the above case there was meeting between the parties without intercourse. The parties accepted that plaintiff's mother took oath not no make intercourse and she was standing at the door to check the same. Thus the *khilwate sahiha* was also not there what to say about intercourse.

That the Ist pronouncement was effected and the rest two were ineffective. The parties were allowed to enter into marital tie. (The petition was rejected).

APPENDIX II A

QUESTIONNAIRE FOR THE GENERAL PUBLIC REGARDING SHARIAT COURT (UNDER IMARATE SHARIA)& IMARATE SHARIA,BIHAR.

1. you think that Govt. supports Imarat and Quza system?

(i) Yes

(ii) No

(iii) Can't say

2. If supports what is the way ?

   (i) Allowing it to continue.

   (ii) Acceptance of the decisions.

   (iii) Police help whenever they want.

   (iv) Monetory help.

   (v) Can't say

3. Do you know the procedure of filling the case?

   (i) Yes

   (ii) No

4. Do you think that Qazis are competent to decide the matter of personal law?

   (i) Yes

   (ii) No

   (iii) Can't say

5. Do you think that Qazis are to be referred every case of Muslims?

   (i) Yes

   (ii) No

   (iii) Can't say

6. Should the advocates of the disputants be allowed to argue case before the Qazi Court?

   (i) Yes

   (ii) No

7. What opportunity ought to be provided to the disputant to establish their case before the compromise is arrived at?

   (i) Arguments of the advocates

   (ii) Arguments of the parties

   (iii) Arguments of the witnesses.

   (iv) Any other

8. Should the date be sometimes postponded in case of the possibility of future compromises?

(i) Yes

(ii) No

9. Should the Regular Court postpone the hearing of matter is heard in Shariat Court?

(i) Yes

(ii) No

(iii) Can't say

10. Vice-versa.

(i) Yes

(ii) No

11. Do you think that advocates advise to institute the case in Regular Courts rather than Shariat Court?

(i) Yes

(ii) No

(iii) Can't say

12. Why persons used to go to Shriate Court?

(i) Due to speedy redressal.

(ii) Due to monetary saving.

(iii) Due to religious feeling.

(iv) Due to easy process.

(v) Can't say

13. Why some persons avoid to go to Shariat Court?

(i) Due to lack of coercive agency

(ii) Due to difference of School of thought

(iii) Due to lack of confidence in Shariat Court

(iv) Vested interest

14. Do you think that the implementing agencies of the Shariat Court are effective?

(i) Yes

(ii) No

(iii) Can't say

15. Do you think that establishment of Shariat Court is right of Muslims?

(i) Yes

(ii) No

16. Do you think that the role of Shariat Court is merely confined a propaganda value rather than dispensation of justice?

(i) Yes

(ii) No

(iii) Can't say

17. Do you feel that the establishment of Shariat Court has lessened the burden of Regular Courts?

(i) Yes

(ii) No

(iii) Can't say

18. By which means you become aware with Shariat Court?

(i) By Noqaba

(ii) By Local Alim

(iii) By Disputants

(iv) Other than this

19. Which thing of Imarat do you like? (order of preference)

(i) Educational facilitation programme.

(ii) Hospitals

(iii) Relief work

(iv) Quza work system

(v) Reformation programme.

(vi) Dislike

20. How much %age you send to Imarat?

(i) Of gift

(ii) Of zakat

(iii) Of sadaqh

(iv) Charm Qurabni

21. Do you think that Imarate Sharia has put an impact on social and religious life of Muslims?

(i) Yes

(ii) No

Signature

Name

Address

Educ. Qualification

APPENDIX II B:

QUESTIONNAIRE FOR BENEFECIARIES, DISPUTANTS OF SHARIAT COURT (UNDER IMARATE SHARIA), REGARDING SHARIAT COURT (UNDER IMARATE SHARIA),& IMARATE SHARIA, BIHAR.

1. Have you ever referred your case to the Shariat Court?

(i) Yes

(ii) No

2. Do you know the procedure to file the case in Shariat Court?

(i) Yes

(ii) No

3. Did your advocate ever encourage you to refer your cases to Shariat Court?

(i) Yes

(ii) No

4. Did you feel the need of service of the advocate in Shariat Court?

(i) Yes

(ii) No

5. Was the decision in your favour?

(i) Yes

(ii) No

6. Are you satisfied with the functioning of Shariat Court?

(i) Yes

(ii) No

7. What were the reasons, which finally created obstacles in not arriving at the compromise in your case?

(i) Attitude of opponent.

(ii) I did not want

(iii) Lack of Imarate Sharia

(iv) Can't say

8. What were the reasons, which helped you and your adversory to reach at a compromise and finally dispose off the cases?

i) Quick disposal

ii) Advisory submission

iii) Any other

9. Why did you refer attended your case in Shariat Court?

i) For quick disposal

ii) Due to absence of fee

iii) Due to fear to face regular court

iv) Due to religious feeling

v) Can't say

10. Has the tension between you and your adversory lessended and relationship improved after the settlement in shriat court?

(i) Yes

(ii) No

11. How much time was taken by Shariat Court to settle your case?

i) Less than one year

ii) One year

iii) More than one year

12. Who suggested you to go to Shariat Court

i) Naqib of imarat,

ii) Alim of my area

iii) Inner conscience

iv) Any other

13. Have you popular faith in working of imarate sharia?

(i) Yes

(ii) No

14. Are you aware that Qazi can dissolve the marriage if there is reasonable ground?

(i) Yes

(ii) No

15. Now which court you will prefer?

(i) Shariat Court

(ii) Regular court

(iii) Time will say

16. Are you satisfied with the Qazis of Shariat Court?

(i) Yes

(ii) No

17. Why have you complied the orders of Shariat Court?

i) Due to social pressure

ii) Due to easy process /order

iii) Due to religious feeling

iv) Other than this.

18. What was your reaction when you lost the case or when judgement was delivered against you?

i) Challenged the decision in Regular court

ii) Challenged the decision in Shariat Court

iii) Abused the Qazi

iv) Accepted the decision

Signature

Name

Address

Educ. Qualification

APPENDIX II C

PERSONS RELATED TO TRADITIONAL LEGAL SYSTEM/JURISTS/ ACADEMICIANS (LAW), ABOUT SHARIAT COURT (UNDER IMARATE SHARIA) & REGARDING IMARATE SHARIA, BIHAR.

1. Are you aware of the steps taken by the Imarate Sharia to run Shariat Court?

   i). Yes

   ii). No

2. The Shariat Court & Imarat of Bihar gets the authority from?

(i) Holy Quran & Hadith

(ii) Custom

(iii) Qazi's Act

(iv) Indian Constitution

3. Why persons refer their cases to the Shariat Court?

(i) Due to religious factors

(ii) Due to monetory reasons

(iii) Due to quick disposal

4. Have you a popular faith in the functioning of Shariat Court?

(i) Yes

(ii) No

5. Do you favour referring of Muslim all personal Law cases to the Shariat Court?

(i) Yes

(ii) No

6. Do you think that Shariat Court can deliver better justice than the Regular Court (in personal law matters) ?

(i) Yes

(ii) No

7. What role can a lawyer play in getting a matter referred to the Shariat Court?

(i) Very significant role

(ii) Less significant role

(iii) Insignificant role.

8. What role can a judge of the Regular Court play to refer the cases of the Shaiat in Court?

(i) Very significant

(ii) Less significant

(iii) Insignificant

9. Are you satisfied with the functioning of Shariat Court?

(i) Yes

(ii) No

(iii) Can't say

10. If you are not satisfied what are the reasons of dissatisfaction?

(i) Improper selection of Qazis

(ii) Extra legal procedure

(iii) Lack of sanction

(iv) Non recognition by Courts.

(v) Due to difference on ideological basis.

11. Would you like to suggest any thing for the better functioning of Quza System under Imarate Sharia ?

(i) Legal Procedure should be strictly followed

(ii) Without sanction it would be ineffective

(iii) Without recognition of the Court it will

lose its importance

12. Do you feel that the functioning of Shariat Court have reduced the Court's arrears in Bihar?

(i) Yes

(ii) No

13 . How much time Shariat Court is taking in deciding the matters?

(i) Less than one year

(ii) One year

(iii) More than one but less than two years

14. The decisions of Shariat Court are just like decisions of ?

(i) Regular Court

(ii) Award of arbitration

15. Do you think that the role of Shariat Court is merely confined to a propaganda value rather than dispensation of justice?

(i) Yes

(ii) No

16. Is it an example of an alternative of dispute resolution?

(i) Yes

(ii) No

17. Would you like to suggest any effective measure to the Qazis to resolve the disputes?

(i) Yes

(ii) No

18. The dejure position of decision of Shariat Court regarding personal law matters should be?

(i) Equal to Regular Courts

(ii)Like award of arbitrator

Signature

Name

Address

Educ. Qualification

APPENDIX II D:

QUESTIONNAIRE FOR THE PERSONS ASSOCIATED WITH IMARATE SHRAIA, REGARDING SHARIAT COURT (UNDER IMARATE SHARIA) & IMARATE SHARIA, BIHAR

1. The authority of the Shariat Court in India is derived from ?

   i). Custom

   ii). Holy Quran & Hadith

   iii). Qazi Act 1860

   iv). Constitution of India

2. The reason of less reference of cases to the Qazi is ?

   i). Parties are unaware about Qazi Court.

   ii). Lack of initiative by advocates.

   iii). Disbelief in the working of Quza.

   iv). Due to difference of thoughts.

   v). Any other

3. What step would you like to suggest increasing the number of reference of cases to the Quza?

   i) General awareness about Imarat & Qaza

ii) Development of confidence building measures in the working of Imarat.

iii) Initiative of the advocates/lawyers.

iv) Any other.

v) No need

4. Whether there is any campaign to make the awareness about Imarat?

   (i) In the masses

   (ii) In the Ulema

   (iii) In the influential persons

   (iv) No

5. Will Imarat help in realization of religious rights of Muslims?

   (i) Yes

   (ii) No

6. Will Imarat help in preserving the Muslim culture in India?

   (i) Yes

   (ii) No

7. Whether Imarate has brought any attitudinal change in outlook of the Muslims?

   (i) Yes

   (ii) No

   (iii) Can't say

8. Is the idea that the process of decision making of Imarat & Quza is based on rule of natural justice?

   (i) Yes

   (ii) No

   (iii) Can't say

9. Is it fact that persons believe that *Nyaya Panchayats* at village level and Regular Courts at different levels have badly failed to provide justice within reasonable time and made it difficult to have justice at cheaper rate.

   (i) Yes

   (ii) No

   (iii) Cannot say

10. We accept the cases related to.

    (i) Civil

    (ii) Criminal

    (iii) Matrimonial

    (iv) Any other

11. Is it true that the hands of Qazi are sometimes tightened by the limits of the circumstances?

    (i) Yes

    (ii) No

(i) Social pressure

(ii) Religious pressure

(iii)Other than this

17. If parties are of different schools of thought which school is preferred in decision.

(i) Plaintiff's School of thought

(ii) Defendant's School of thought

(iii) Established rule of Imarate Sharia.

18. Is the decision of Shariat Court recognised by Regular court?

(i) Yes

(ii) No

(iii) Can't say

19. Do you feel that recognition & sanction will make the Shariate Court more effective?

(i) Yes

(ii) No

Signature

Name

Address

Educ. Qualification

APPENDIX II E:

QUESTIONNAIRE FOR ISLAMIC SCHOLARS (*ULEMA*) REGARDING SHARIAT COURT (UNDER IMARATE SHARIA) & IMARATE SHARIA, BIHAR.

1. Do you feel that establishment of Imarat is necessary for Islamic life in India?

(i) Yes

(ii) No

2. Is Imarate Sharia fit to be cited as a practical shape of Islamic concept of Imarat?

(i) Fully

(ii) Partially

(iii) Never

(iv) Can't say

3. Are you satisfied with the method of adjudication of Imarate Sharia?

(i) Yes

(ii) To some extent

(iii) No

(iv) Can't say

4. Is it appropriate to establish separate court for different schools of thought?

(i) Yes

(ii) To some extent

(iii) No

5. Is a Qazi competent to adjudicate the matter of other School of thought than Qazi?

(i) Yes

(ii) To some extent

6. Is Qazi authoriz to adopt the rule of other Schools of thought in emergency?

(i) Yes

(ii) To some extent

(iii) No

7. Should a Qazi follow the case law?

(i) Yes

(ii) No

8. In deciding the issues, the Qazis should?

(i) Mention that from which Hadith and/or Ayat of the Holy Quran they deduce the rule.

(ii) Mention that from which School book they deduce

(iii) No need to mention

9. Is it better to avoid the Regular Courts by Muslims?

(i) Yes

(ii) No

10. Why one should avoid Regular Court for personal law matters?

(i) Judges are not aware with Islamic rules.

(ii) It is not possible to get justice properly in Regular Courts.

(iii) There is provision in Indian law.

(iv) Qazis are well aware with Islamic rules so they can provide better justice.

(v) Sunnah prevents Muslims to go in an unIslamic court.

11. What is your opinion about Amir of Imarate Sharia?

(i) They have done enormous services.

(ii) They have done nothing new.

(iii) Cannot say.

12. Is Qazi authorising to give verdict according to other School of thought?

(i) Yes

(ii) Yes, if that is in accordance with Quran & Hadith

(iii) No but only Quran and Hadith

(iv) No

(v) Can't say

(vi) It is bad to talk about Schools

13. Do you think that in certain cases the intervention of Qazi is necessary otherwise the matter will not be treated as resolved in the eyes of Islam?

(i) Yes

(ii) No

Signature

Name

Address

Educ. Qualification

APPENDIX - III; LIST OF THE CASES TAKEN FOR THE STUDY:

Name of the case	Case No.
1. Tuhrun Nisa v. Manzoor Alam	19-4276-1384 AH
2. Rafeya Khatoon v. AbdusSami	56-4519-1385 AH
3. Mahmood v. Aziza Khatoon	1-24-1388 AH
4. Noor Jahan Begumv. Mohd Yunus	14-4271-1384AH
5. Rasulan v. Abdus Subhan	30-334-1414AH
6. Saleeman v. Shaikh Shafat	7-270-1348AH
7. batulan v. Yusuf Khan	24-261-1347AH
8. Rehana v. Saleem	251-6259-1388AH
9. Nazumuddin v. Firoza Bano	236-12009-1406AH
10. Safina v. Israil	129-7205-1392AH
11. Alima Khatoon v. Mohd. Idress	78-3729-1383AH
12. Raisa Khatoon v. Mohd. Mumtaz	216-11962-1406AH
13. Khursheeda v. Mohd. Arman	242-15007-1414AH
14. Shahina Parveen v. Javed Nihal	240-15609-1415AH
15. Shahzadi v. Shahid Khan	92-16222-1414AH
16. Nuzhat Jahan v. Mohibbul Hasan	85-14373-1415AH
17. Mumtaz v. Naushad	101-15370-1415AH

18. Shahin v. Abdul Majid Iftekhar	252-15521-1415AH
19. Khairun Nisa v. Asghar Ali	156-14007-1414AH
20. Hafizan v. Mohd. Farooq	118-13615-1418AH
21. Safia v. Mohd. Tayyab	151-11521-1405AH
22. Ruqayya v. Mujid Alam	391-15156-1414AH
23. Serajuddin v.Nikhat Sultana	72-16202-1417AH
24. Mohd. Qamruddin v. Majida Khatoon	272-10203-1401AH
25. Fatima v. Khuda Bakhsh	273-10204-1401AH
26. Zahra v. Khuda Bakhsh	274-10205-1401AH
27. Parveen v. Mirza Tahir Bagi	152-11522-1405AH
28. Seema Faizi v. Khursheed Alam	173-16303-1417AH
29. Fahimul Haque v. Maryam Khatoon	55-16185-1417AH
30. Sohrab Quresh v. Nashaba	51-16181-1417AH
31. Mohd. Saleem v. Hasina	319-14170-1417AH
32. Rafat Parveen v. Mumta Alias Raju	377-14228-1412AH
33. Shaibul Nisa v.Shahadat Hussain	237-13642-1411AH
34. Suraiya v. Dr.Akram	145-13642-1411AH
35. Zeenat Ara v. Nisar Ahmad	76-13573-1411 AH
36. Shamshad Ara v. Nizamuddin	242-13495-1410AH

37. Mehrun Nisa v. Akhter	73-13226-1410AH
38. Zeenat Parveen v.Irfan	232-12676-1408AH
39. Mohd. Nazim v. Firozah Bano	263-12009-1406AH
40. Zareena v.Mohd. Siddique	148-11894-1406AH
41. Jawad Ahmad v. Gulshan	242-11612-1405AH
42. Syed Sarajv. Shahidah	16-10295-1402AH
43. Zahid Ali v. Shamshad Begum	73-9408-1399AH
44. Zubaida v. Abdus Sattar	64-6922-1391AH
45. Naseem Ahmad v. Naseem Haider	113-16788-1419AH
46. Kariman v. Mohd. Mahboob	248-15931-1416AH
47. Sirjabeen v. Ahsan Ahmad	104-16534-1418AH
48. Hamida v. Niyazul Haque	353-15622-1415AH
49. Syed Afqar Hussain v. Shanaz Bano	90-16765-1419AH
50. Husan Ara v. Abdur Razzaq	135-16810-1419AH
51. Tabarab Khatoon v. Mohd. Shibli	24-8395-1396AH
52. Fatma v.Salamat Mia	282-14133-1412AH
53. Rehana v. Saleem	251-6259-1388AH
54. Samirul Nisa v. Siddique Mia	5-6864-1399AH
55. Asma v. Liaqat	18-6877-1391AH

54. **Fatma** v. Salimullah 19-6878-1391AH

55. **Phoolo** v. Nizamul Haque 41-6900-1391AH

56. **Shahzadi** v. Qumaruddin 58-6917-1391AH

57. **Nazda** v. KamalAhmad 65-6924-1391AH

58. **Zaheerab** v. Samiruddin 78-6937-1391AH

59. **Samima** v. Salim 128-6987-1391AH

60. **Akhtari** v. Mohd. Khaleel 130-6989-1391AH

61. **Fatma** v. Samiullah 170-7029-1391AH

62. **Shamimon** Nisa v. Fazlc Karim 174-7033-1391AH

63. **Najmul** Nisa v. Abdul Ghafur 260-7119-1391AH

64. **Shaberan** v. Anwar 271-7129-1391AH

65. **Zabeeda** v. Tasleem 296-7155-1391AH

66. **Bashiran** v. Karim 261-7160-1391AH

67. **Safina** v. Abdul Qayum 316-7175-1391AH

68. Aassma v. Ilahi Mian 100-15783-1416AH

69. Fareedah v. Nizammuddin 419-16102-1416AH

70. Husan Ara v. Khrsheed 430-16113-1416AH

71. Hameda v. Shamshair 438-16121-1416AH

72. Aliqa v. Ghyasuddin 107-16237-1417AH

73. Parwez v. Zubaida	297-16427-1417AH
74. Jahan Ara v. Shahnawaz	364-14652-1413AH
75. Saira v. Aftab	380-15145-1414AH
76. Tabseen Naz v. Moinuddin	480-15245-1414AH
77. Wahida v. Shoaib	12-15281-1415AH
78. Nasima v.Amiruddin	72-15341-1415AH
79. Safia v. Aslam	104-15373-1415AH
80. Yasmin v. Munna	372-15641-1415AH
81. Razia v. Fazlu Mazloom	374-15643-1415AH
82. Rukhsana v. Zubair	49-15732-1416AH
83. Rousban v. Abbas	95-15778-1416AH
84. Shahjahan v. Shamsul Haque	16-16446-1418AH
85. Husan Ara v. Mahtab	68-16743-1419AH
86. Mohd. Mussain v. Nazneen	88-1666-1391AH
87. Jamila v. Jalaluddin	7-6866-1391AH
88. Hafizan v. Kamaluddin	126-6980-1391AH
89. Noor Fatia v. Anwar Hussain	317-14605-1413AH
90. Rasheeda v. Suleman	141-700-1391AH
91. Khadiza v. Habibur Rahman	144-7003-1391AH

92. Najma v. Saleem	154-7013-1391AH
93. Shahjahan v. Sharafuddin	206-7065-1391AH
94. Shahnaz v. Kamal	48-14336-1413AH
95. Farzana v. Rafi Ahmd	461-16075-1416AH
96. Anjum Ara v. Haider Ali	392-16075-1416AH
97. Shahjaban v. Murtuza	100-15883-1416AH
98. Rabiya v. Tasleem	229-15912-1416AH
99. Akhtari v. Akhtar	293-7142-1391AH
100.Bibi Hussaini v. Shafique	161-7020-1391AH
101.Asma Khatoon v. Shakil	82-16370-1413AH
102.Nasima v. Manzoor	8-6867-1391AH
103.Hamida v. Nizammuddin	280-7139-1391AH
104.Hadisa v. Saleem	137-6994-1391AH
105.Zulaikha v. Abdol Salam	294-7153-1391AH
106.Bibi Safia Bi v. Qasim	243-7102-1391AH
107.Mohd. Qamaruddin v. Farhat Nasreen	285-16415-1417AH
108.Shama Parveen v. Anwar Hussain	35-12806-1409AH
109.Akhtari Bano v. Haji Mohd. Siddiqu\e	166-15849-1416AH
110.Mohd. Jalaluddin v.Sanjeeda	300-15569-1415AH

111.Mohd. Jaleel V. Mohd. Hassan	30-8401-1396AH
112.Qamrul Huda V. Imteyaz Hussain	23-9954-1401AH
113.Zubaida V. Abdul Ghafoor	184-14949-1414AH
114.Syed Tahsheen V. Syed Shakeel	278-12024-1406AH
115.Shaikh Bikari V. Shaikh Alam	113-10044-1401AH
116.Samiullah V. Anwar	62-14192-1417AH
117.Ali Hussain V. Mohd. Qasim	335-8706-1396AH
118.Sabra Khatoon V. Nesar Ahmad	49-13202-1410AH
119.Abdul Moeed V. Mohd. Iftekhar	285-15554-1415AH
120.Management Committee V. Masjid Nalanda	331-11701-1405AH
121.Mohd. Hashim V. Makinuddin	135-13976-1412AH
122.Zabiruddin Khan V. Abdul Shakoor Khan	76-6627-1390AH
123.Nasibullah Ansari V. Farehullah Ansari	75-7514-1393AH
124.Mohd. Sulaiman Khan V. Shamima Bano	28-14316-1413AH
125.Abdullah V. Khurshced Alam	53-7832-1394AH
126.Abdul Hakim V. Noor Mohd. Choudhary	117-9732-1400AH
127.Abdul Qaiyum V. Abdul Qayan	101-8-1385AH
128.Noor Jannat V. Haji Abdul Razzaque	106-9108-1398AH
129.Mohd. Umar V. Dr. Akhtar Hussain	267-8345-1395AH

130.Immi V. Bona Mian 97-4354-1384AH

131.Shaikh Wasim V. Mohd. Ali 85-16215-1417AH

132.Sadya V. Aquil Ahmad 315-12707-1408AH

135.Madina Khatoon V. Master Abdul Samad 237-14525-1413AH

134.Noor Mohd. V. Amanat Hussain 391-14679-1413AH

135.Kulsoom V. Mohd. Hanif And Others 4-14769-1414AH

136.Mohd. Fazlur Rahman V. Mohd. Khalid 156-15425-1415AH

137.Bashiruddin V. Noor Mohd. 177-15446-1415AH

138.Nasrah Khatoon V. Naimatullah 193-8564-1396AH

139.Raqeebun Nisa V. Faizur Rahman 137-10416-1402AH

140.Sabra Khatoon V. Mohd. Asghar 175-10254-1402AH

141.Sakina V. Suleman 176-10255-1402AH

142.Zarina Khatoon V. Mohd. Manzar 36-1088-1402AH

143.Md. Suleman V. Shabnam Bano 28-14316-1413AH

144.Bibi Khairun Nisa V. Md. Azmatullah Ansari 226-14077-1412AH

145.Sabirat Bibi V. Md. Ashfaq Ansari 8-1-1408AH

146.Mohd. Khaleed V. Mohd. Ahsan 316-12062-1406AH

147.Khoosnuda Khatoon V. Azizul Haque 248-15013-1414AH

148.Shahmina Khatoon V. Mohd. Hasan 89-6948-1391AH

EGYPT

1. Dissolution of marriage granted by the court for want of maintenance shall constitute a revocable divorce. It may be revoked by the husband who proves, during the period of *'idda*, that he is now able and also willing to pay maintenance to the wife. Where his affluence is not proved, or he is not willing to pay maintenance, revocation of divorce shall not be lawful.

2. Where a missing person returns, or is proved to be alive, his wife belongs to him, unless she has meanwhile remarried and the second husband has consummated the marriage without having any knowledge of the former husband's life, in which latter case the wife would belong to the second husband, provided that the marriage did not take place during the *'idda* for the first husband.

3. A wife can seek judicial divorce if the husband is suffering from some chronic disease the treatment of which is impossible, or would be very lengthy, and which renders continuance of marriage injurious to the wife—e.g., insanity, leprosy and leucopathy, etc.—provided that if the husband had the disease before the marriage, she was not aware of the fact at the time of marriage; and if he developed it after marriage she did not agree to continuance of marital relations after knowing it. If she has married him knowing of his disease, or has expressly or impliedly ignored it where he has developed it after marriage, annulment of marriage will not be allowed.

4. Divorce granted due to disease shall effect an irrevocable divorce.

5. Where dissolution of marriage is claimed under this law the court may seek medical opinion.

Law of Personal Status 1929

[Law 25 of 1929 as amended by Law 100 of 1985]

1. A talaq pronounced under the effect of intoxication or compulsion shall not be effective.

2. A conditional talaq which is not meant to take effect immediately shall have no effect if it is used only as an inducement to do some act or to abstain therefrom.

3. A talaq accompanied by a number, expressly or impliedly, shall not be effective except as a single divorce.

4. Symbolic expressions of talaq,i.e., words which may or may not bear the implication of a divorce, shall not effect a divorce unless the husband actually intended it.

5. Every talaq shall be revocable,except a third talaq, that given before consummation,that for a consideration, and that expressly described as irrevocable in this law or under law 25 of 1920.

5-A. A husband who divorces his wife shall get the divorce registered within thirty days from the date of pronouncement. If the divorced wife is present at the time of registration,her knowledge of divorce shall be recognized. But if she is not present,the registrar shall notify the talaq to her through a court official and get delivered to her or her nominee a copy of the certificate of divorce. Every divorce shall be effective from the date of the pronouncement— except when the husband has concealed it form the wife, in which case for the purposes of succession and other financial rights it will become effective on the date when it comes to her knowledge.

6. If a wife alleges that the husband has been cruel to her in a way which makes the continuance of the marital relationship impossible for women of her class,she can apply to the qadi for divorce. The qadi shall grant her dissolution of marriage, constituting an irrevocable divorce, if the allegation is proved and no mutual reconciliation between the spouses seems possible. Where the qadi rejects the wife's plea and she later repeâts her allegation but is unable to prove it, he shall appoint two arbitrators as laid down in articles 7 to 11 of this law.

7. The arbitrators must be just persons chosen as far as possible, from the relatives of the spouses. If that is not possible, they can be appointed from amongst non-relatives having full knowledge of the circumstances of the parties and having the ability to effect reconciliation.

8. (a) Appointment-order of arbitrators shall indicate the dates when they will commence and finish their work; the period of arbitration shall not exceed six months.The court shall inform the arbitrators and the parties about these matters. The court shall also require the arbitrators to take oath that they will perform their function with justice and good faith.

(b) The court may give an additional period not exceeding three months, and if the arbitrators are unable to submit their award within this extended period, it shall assume that they are unable to reach an agreement.

9. Failure of any of the parties to attend the sessions of arbitration,after they have been informed,shall not affect the process of arbitration. The arbitrators shall make inquiries into the causes of discord and take all possible measures to effect a reconciliation.

10. Where the arbitrators are unable to effect a reconciliation— (i) if the fault lies on the part of the husband,the arbitrators can decree a single irrevocable divorce,assuring that the wife will not lose any of her rights which would normally arise from the marriage and on divorce; (ii) if the fault lies on the part of the wife, they can decree a divorce subject to payment of compensation by the wife;(iii)if the fault lies with both parties,they can decree a divorce either without compensation or on payment of compensation commensurate with the blame on either side;and (iv)if the causes of discord are unknown and the fault cannot be located, they can decree a divorce without compensation.

11.The arbitrators shall submit their award, together with their arguments and reasons, to the court. If the arbitrators cannot agree, the court can appoint a third person who knows of the circumstances of the case and can effect a reconciliation. The new arbitrator shall take oath as provided in article 8. If the arbitrators are still unable to reach an agreement and make an award within the period allowed by the court,the court shall proceed to take evidence. Where the court is unable to effect a reconciliation between the parties and it is clear that there is no possibility of reconciliation between them, while the wife insists on divorce, the court may decree dissolution of marriage by a single irrevocable divorce with loss of all or some monetary rights of the wife and with payment of compensation by wife in all suitable cases.

11- A. A man getting married shall declare his marital status in his application for registration of marriage. If he is already married, he shall disclose the name and address of his existing wife. The registrar shall in that case inform her of the new marriage by registered post, acknowledgement due. A wife whose husband has

married again can seek divorce on the ground of material injury caused by it ,making it impossible to live with him—irrespective of whether or not the marriage contract incorporates a stipulation giving her such a right. If the qadi fails to effect a reconciliation between the parties he will grant an irrevocable divorce. The wife's right to seek a divorce under this provision will lapse if she does not initiate action within one year from the date on which she comes to know of the second marriage,or if she has consented to it expressly or impliedly. She will, however, have this right each time her husband marries again. If the new wife did not know at the time of marriage the fact of the man being already married and comes to know of it subsequently, she can similarly seek a divorce.

11-B. If a wife refuses to live with her husband without having a right to do so, her maintenance may be stopped from the date of refusal. Refusal without right shall be taken into consideration if she does not return to the matrimonial home on her husband's demand notified, through a court official, to her personally or to her nominee. The husband must indicate in the notice the place of residence. The wife can file her objections before the court of first instance within thirty days of the date of such notice, and she must mention in her statement of objection the legal reasons entitling her to refuse to live with her husband, failing which her objections shall be rejected. If she does not file her objections before the expiry of the date fixed for filing the same,her maintenance may be stopped form the said date.The court shall, while going through the objections,or on the demand of either party,intervene to settle the dispute between them and effect a reconciliation so that the marriage may continue with a cordial conjugal life.But if the court finds that the dispute is grave and the wife wants a divorce, it shall order measures of arbitration as laid down in articles 7-11 of this law.

12. If a husband goes away from his wife for one year or more, without legal excuse,she may apply to the qadi for divorce effecting an irrevocable talaq, if she has suffered injury from the husband's absence—even though he has left property from which she can obtain maintenance.

13. In a case where it is possible to contact the husband by letter, the qadi shall send a warning to him to the effect that his wife will be granted dissolution of marriage if he does not return to her, or send for her to join him,within a specified period.If he fails to do

so without a reasonable excuse,the qadi may grant a divorce.If the husband cannot be contacted,dissolution of marriage can be pronounced without delay.

14. If the husband is sentenced by a final order of a court to imprisonment for at least three years, after he has actually served at least one year of the sentence the qadi can be approached for the grant of an irrevocable divorce,even though the husband may have left property out of which maintenance can be obtained.

15. A disputed claim of paternity shall not be entertained if it concerns the child of a woman between whom and her husband non-access from the date of marriage is proved, or a child born to a woman more than a year after she was left by her husband,or one born to a divorcee or widow more than a year after the date of divorce or the husband's death.

16. The scale of maintenance for a wife shall be fixed with reference to the means of the husband, considering whether he is affluent or indigent at the time of the claim.However, the scale of maintenance for a wife where the husband is indigent shall not be less than what she needs for her basic necessities. Where the qadi is satisfied that there is the right for payment of maintenance and its conditions are fulfilled, he shall within two weeks maximum from the date of filing of the suit, make an interim order for payment of maintenance for the wife and minor children (in order to meet their basic needs), to take effect at once and to be in force until a decree is made on the application for maintenance. The husband can adjust the payment for interim maintenance against the amount ordered to be finally paid for maintenance under the order of the court,provided that the amount to be finally received by the wife after such deduction must be sufficient for the basic maintenance.

17. A claim of maintenance in respect of the period of *'idda* shall not be entertained if made after the expiry of one year from the date of divorce. Similarly, a disputed claim of inheritance based on the ground of marriage made by a divorced wife after her husband's death shall not be entertained if made after the expiry of one year from the date of talaq.

18. It is not permissible to execute an order of maintenance passed after the enforcement of this law for a period exceeding one year from the date of divorce.It is also not permissible to execute an

order passed before the enforcement of this law for what completes one year from the date of divorce.

18-A. A wife who after consummation of her valid marriage is divorced by the husband without her consent and without any fault on her part shall be entitled, in addition to maintenance of talaq,to a *mut'a* equivalent to at least two years maintenance, subject to consideration for financial status of the husband,circumstances of the divorce and duration of the marriage between the parties .The husband shall be entitled to pay such *mut'a* in instalments.

18-B. If a child has no property, the obligation to maintain it shall fall on its father. The obligation to maintain children shall be borne by the father until the child, if a female,is married or has obtained employment from which she can maintain herself; and, if a male. has attained the age of fifteen years and can earn properly.However,if a child is unable to maintain himself because of physical or mental disabilities,or because he is at school for education customary for children like him and proportionate to his capabilities,or because he is unable to get an employment, the obligation to maintain him shall remain with the father even after the child has completed his fifteenth year.The father must provide maintenance and residence to his children in accordance with his financial capabilities.The standard of maintenance shall be such as to secure a reasonable standard of living which children like them deserve.The father can be directed to pay maintenance to his children from the date on which he refuses to pay it.

18-C. The divorcing husband shall provide for his minor children from the divorced wife and their custodian a proper and independent house. If he does not do so during the period of *'idda*, the matrimonial home (if it is rented) will be retained by the wife for this purpose—without the divorcing husband—during the legal period of custody.If the matrimonial home is not rented,the divorcing man will be entitled to its possession if he provides to the divorced wife and children a proper and independent house after the expiry of *'idda*. The qadi will give to the mother-custodian the option between living in the matrimonial home or rental for a suitable house for the children in her custody and herself.

After the expiry of the legal period of custody,the divorcing man can take back the house with his children,if he is otherwise

legally so entitled. If there is a dispute about the matrimonial home herein referred to the Public Prosecution Department shall pass orders,to remain in force until the decision of the court

19. If there is a dispute between the spouses regarding the amount of dower,the wife shall be asked to prove her claim. If she fail to do so, the statement on oath made by the husband shall be accepted unless he states an amount which cannot be normally supposed to be the dower of a woman of her status, in which case the proper dower of the wife shall be binding on him. Same rules shall apply where the parties to the dispute relating to dower are one of the spouses and the heirs of the other spouse, or heirs of both the spouses.

20. (1) The right of a woman to custody of her children shall cease on the attainment of the age of ten years in the case of male children and twelve years in the case of famale children.After the child has attained such age, the qadi can order the child to continue in such custody—without remuneration—until the male child attains the age of the fifteen years and the female child gets married, if he is satisfied that the welfare of the child so demands. Each of the parents shall have the right to visit their children. The right shall belong to the grandparents if the parents are dead. If any problem arises in arranging such visits by the consent of both parties, the court shall arrange the same subject to the condition that it shall not affect the feelings of the child.

(2) Visits shall not be made by force. But if any of the parties refuses to allow the visit without just cause,the qadi can give a warning.If the defaut continues,he can by order transfer the custody of the child to the person next among those entitled to the same,for a fixed period.The right of custody belongs to the mother, then to the close female relatives, preference among them being for those related through mother or through both parents, in the following order:— mother, maternal grandmother how high soever, paternal grandmother, how high soever; sister by full blood, sister by uterine blood, sister by half blood;daughter of sister by uterine blood;maternal aunts by full,uterine,half blood, respectively; daughter of sister by half blood;daughter of brother (full,uterine, half,in that order);paternal aunts (full, uterine,half); mother's maternal aunts (full, uterine,half); father's maternal aunts (full,

uterine,half); mother's paternal aunts (full,uterine, half); father's paternal aunts (full, uterine, half). If there is no one from those set out here ,or none suitable to look after the child, or their period of custody has been terminated, the right of custody shall pass on to the male agnates entitled to inherit from the child. The true grandfather will, however,have precedence over brothers.If there is no one from those stated here,the right of custody goes to non-agnate male relatives of the child in the following order:— mother's grandfather, uterine brother, his son, mother's brothers by full, half and uterine blood,respectively.

21. A missing person may be declared dead after the expiry of four years since the date of disappearance in the circumstances in which death is highly probable.In all other circumstances the time after which death may be declared is left to the discretion of the qadi. In all cases investigation through all possible means which can help ascertain the fact of his life or death shall,first, be made by the court.

22. After a missing person has been declared dead, as specified in the preceding article,his wife must observe *'idda* of death and his property may be distributed among those of his heirs who are alive at the time of the decision.

23. The year referred to in articles 12 to 18 of this law is a solar year of 365 days.

23-A. A person who divorces his wife in violation of article 5-A of this law shall be liable to punishment with imprisonment for a period up to six months or with fine up to 200 Egyptian pounds or with both. Same will be the punishment for a man who makes a false declaration to the registrar regarding his marital status or address of his existing wife or wives,or divorced wife ,in violation of the provisions of article 11-A.A registrar who neglects or fails to carry out his duties under this law shall be punished with imprisonment up to one month and with fine not exceeding 50 Egyptian pounds. He may also be dismissed or suspended for a period up to one year.

(c) Law of Bequest 1946

[Law 71 of 1946]

76. If a deceased person has left behind grandchildren,male or famale,whose link-parent died before or with such person, a

bequest in their favour will be binding on such person. The amount of such bequest shall be equal to the share which the link-parent concerned would have inherited in case of his or her death just after the death of the praepositus. It shall not, however, exceed one-third of the estate. Such an obligatory bequest shall not be due if the praepositus has already made in their favour either a bequest or a gift equivalent to what would otherwise be the amount of such bequest.The principle shall be applicable to the descendants of a predeceased daughter of the first generation only;among those of a predeceased son all agnatic descendants how low soever will have its benefit. Each ascendant shall exclude his own descendants only.The share of each predeceased descendant shall be divided among his or her heirs in accordance with the rule of 'double share for the male '.

77. Where the praepositus has already left a will in favour of a grandchild entitled to an obligatory bequest, if the optional bequest exceeds the amount of obligatory bequest, the excess will be governed by the general law of wills.If the amount of the optional bequest is less than the obligatory bequest, the deficiency shall be made up.If an optional bequest has been made in favour of some of the grandchildren only, the rest of them shall be given their due.The aggregate of the said optional bequest and what is given to the latter shall not exceed one-third of the estate.

78. If an obligatory bequest cannot be paid out of the remainder of one-third of the estate,optional bequests shall be applied, as far as necessary ,to the payment of the obligatory bequest.

79. What remains out of one-third of the estate after the payment of the obligatory bequest shall be applied to pay optional bequests if any.

IRAQ

Code of Personal Status 1959

[Law 188 of 1959 as amended lastly by Law 90 of 1987]

3.(1) Marriage is a contract between a man and a woman,recongnized by law,the objects of which are to form the bond of life in partnership and to have children.

(2) Where a marriage is established its legal effects shall be binding on the parties from the date of its solemnization.

(3) A promise to marry ,the recitation of *fatiha*, or engagement, shall not constitute a marriage.

(4) Marriage with more than one wife is not permissible except with the permission of the qadi, and the grant of such permission shall depend on the following conditions: (a) the husband's financial position should be sound enough to support the family of more than one wife; (b) any lawful purpose should be involved.

(5) Where injustice between the wives is feared,plurality of wives is not permissible; and determination of this fact lies with the qadi.

(6) All those who enter into a contract of marriage with more than one woman in contravention of clauses (4)and (5) shall be liable to imprisonment for a period not exceeding one year, or to fine not exceeding one hundred dinars, or to both.

(7) The provision of clauses (4)and (5)of this article shall not apply and marriage with more than one wife shall be permissible if the object of such a marriage is a widow.

4. Marriage shall be solemnized by offer made,literally or customarily, by one party to the contract and accepted by the other, or by their representatives.

6.(1) No contract of marriage comes to exist if any of the following conditions of solemnization or validity are not fulfilled: (a) offer and acceptance in the same sitting (b)hearing by both contracting parties of the words of the other party,and their understanding of the implications of the contract, (c) approval of the offer by acceptance, (d) presence of two witnesses possessing legal capacity to contract a marriage,and (e) non-suspension of the contract on a condition or an uncertain event.

(2) Marriage may be solemnized by the writing of an absent person if he wishes in it establishment of marital relations,provided the writing is read out to two witnesses who hear the words and confirm that it effects a marriage.

(3) Lawful conditions stipulated in a contract of marriage shall be valid and must be complied with.

(4) The wife may claim dissolution of the marital contract on the ground of non-compliance by the husband with any such condition stipulated in the contract.

7.(1) Sanity and completion of the age of eighteen years are conditions for the capacity to marry.

(2) The qadi can permit marriage of a person who is mentally ill if he is satisfied, by medical evidence,that the marriage shall not be prejudicial to public interest and that some personal benefit is involved in it ,provided that the other party to the proposed marriage agrees by definite consent.

8. Where a girl who has completed fifteen years of age desires marriage, the qadi can permit it, on proof of her capacity and physical fitness, with the consent of her legal guardian.The guardian's consent will be required by the qadi,to be given within a fixed period;and if he does not object to it, or if his objection is not worthy of consideration,the qadi can permit the marriage.

9.(1) A relative or any other person cannot force anybody, whether male or female,into marriage without his or her consent.A marriage by force would be void if it has not been completed by consummation.Similarly, a relative or another person cannot prevent the marriage of somebody who is competent to marry in accordance with the provisions of this Code.

(2) Any person who violates clause (1) of this article will be liable to imprisonment for a period not exceeding three years and with fine or with either of them,if he is a relative of the first degree.If the person violating the law is anybody else, the punishment will be imprisonment not exceeding ten years or solitary confinement for not less than a period of three years.

(3) The Shari'ah court or the court of personal status shall get the punishments for the violation of clause (1) of this article enforced as per the prescribed procedure.

10. All marriage-contracts shall be registered in a competent court by entry in a special register as follows :

(i) the identity of the contracting parties,their age, the amount of dower,and the fact of the absence of all legal impediments to the marriage, shall be specified in a statement signed by the contracting parties and attested by the headman of their locality or by two responsible persons of the area;

(ii) a medical certificate shall be attached to the said statement testifying to the freedom of the spouses from diseases and hygienic defects and also to other capacities required by law;

(iii) the entries in the register shall be signed or thumbmarked by the contracting parties in the presence of the qadi who shall attest them and shall issue a certificate of marriage;

(iv) the entries in the register shall be admissible in evidence; the provision relating to dower recorded in the register shall be actionable unless it is discharged in a competent court.

(v) A man who contracts his marriage outside the court shall be liable to imprisonment for a period not less then six months and not more than one year or with fine of not less than three hundred and not more than one thousand dinars.A person who marries again outside the court during the subsistence of an earlier marriage shall be liable to imprisonment for not less than three years and not more than five years.

12. It is essential for the validity of marriage that the woman whom a man wants to marry should not be within prohibited degrees in marriage.

13. Prohibition may be of two kinds:permanent or temporary.Blood relationship, affinity and fosterage cause permanent prohibition ; temporary prohibitions are plurality of wives beyond four, absence of scriptural religion,three divorces, woman's connection with a third person whether of marriage or of *'idda*, and marriage in violation of the bar of 'unlawful conjunction'.

17. Marriage of a Muslim man with a *kitabiya* is valid, but that of a Muslim woman with a non-Muslim is not permitted.

18. If either spouse embraces Islam,he or she shall be governed by Islamic law in the matter of continuance or dissolution of marriage.

19.(1) A woman is entitled to the dower specified in the contract;if it has not been specified she shall get the proper dower.

(2) If the man had given to the fiancee, before the marriage, any property on account of dower, and either party failed to contract the marriage or died ,what was so given shall be returned, if intact; where such property has been lost possession of, its value shall be recoverable.

(3) As to presents, the rules of gift shall be applicable.

20.(1) Dower may be made either prompt or deferred, wholly or in part; where no specific provision is made, custom shall prevail.

(2) The period fixed in the marital contract for entitlement to the deferred dower shall lapse on death or divorce.

21. The wife is entitled to the whole of the specified dower after the marriage is consummated or after either spouse has died. In case of divorce before consummation half of the dower is payable.

22. Where separation takes place after consummation of an invalid marriage, the specified dower or the proper dower, whichever is less, shall be binding; where no dower has been specified in such a case, the proper dower shall be payable.

23.(1) Maintenance of wife is obligatory on the husband in a valid marriage, even if she is living with her parents, except when the husband wants her to come to his house and she refuses to do so without any excuse.

(2) The wife's refusal shall be valid if the husband has withheld her prompt dower or does not provide maintenance to her.

24. (1) The maintenance of an obedient wife shall be regarded a debt against the husband from the time the husband failed to provide it.

(2) Maintenance includes food,clothing,lodging and its amenities, medical expenses recognized by custom, and domestic service of the kind available to women of equal status.

25. (1)There shall be no maintenance for the wife in the following circumstances: (a) where she leaves her husband's house without his permission and without a lawful reason, (b) where she is convicted for an offence (c) where she refuses to travel with her husband without a lawful excuse.

(2) It will not be obligatory for the wife to obey her husband, nor shall she be regarded as disobedient, if her husband is demanding obedience mischievously with an intention to cause her injury or to annoy her; and in the following cases injury shall be presumed: (a) failure of the husband to provide his wife with a reasonable accommodation in accordance with the marital and economic conditions of the spouses; (b) where the house provided by the husband is too far from the wife's place of work to enable her to simultaneously look after her household duties and her official duties; (c) where the household goods in the house provided do not belong to the husband; (d) where the wife is suffering from a disease which prevents her from obeying the husband.

(3) The court shall not pass an order of 'disobedience' as long as there are reasons for disobedience given by the wife.

(4) The court can pass the order of wife's 'disobedience' after exhausting all efforts for the removal of the reasons which have caused disobedience.

(5) Disobedience shall be regarded as one of the reasons for judicial divorce and this will be as follows:

(a) The wife can apply for divorce after the expiry of two years from the date on which the final order of 'disobedience' has been obtained and thereupon the court can grant divorce. In such a case the deferred dower shall lapse and if the wife has been paid the whole of dower it will be obligatory for her to return half of what she has been paid.

(b) The husband can apply for divorce after obtaining final order of 'disobedience' and thereupon the court can grant a divorce. It will be obligatory for the wife to return the prompt dower if it has been paid to her, and the deferred dower shall lapse, provided that the divorce has taken place before the consummation of marriage. Where the divorce has taken place after the consummation of marriage, the deferred dower will lapse and the wife must return half of what has been paid to her if the whole of the dower has already been paid.

(6) The divorce granted under clause (5) of this article shall be regarded as an irrevocable divorce and will result into *bainuna sughra*—"small parting " (i.e., a fresh marriage would be possible without *halala*).

26. The husband shall not accommodate, without the wife's consent ,a co-wife in the marital home, nor shall he accommodate therein without her consent any of his relatives except a child who is incapable of discernment.

29.Where the husband has left his wife without support and has hidden himself, or has disappeared, or has become missing, the qadi shall order maintenance for her from the date of her claim, after the marriage is proved and the wife has sweared that the husband has left no maintenance, that she is not disobedient, and that she has not been given a divorce. The qadi may also permit her to borrow in the name of her husband in case of need.

30.Where the wife is destitute and has been permitted to borrow in accordance with the preceding article, the person who would be responsible for her maintenance, if she is presumed to be without husband, shall advance money to her on demand and according to his capacity. He shall have a right to be reimbursed by the husband only. But if she borrows from a stranger, he can claim

reimbursement from either spouse. Where there is no person to advance money to her or the person responsible to do so is not capable of it, the state shall be responsible for her maintenance.

31. (1) The qadi, while considering a suit for maintenance, may pass an order against the husband for providing maintenance to the wife on a temporary basis.

(2) The said order shall be subject to the final result of the litigation

34.(1) Divorce terminates the bond of marriage when pronounced by the husband, or by the wife who has been assigned or delegated an authority in that regard, or by the qadi. No divorce shall be effective except when pronounced through the legally prescribed formula.

(2) An assignment shall be irrevocable in regard to reconciliation proceedings, arbitration and pronouncement of talaq.

35. No divorce shall be effective when pronounced by the persons mentioned below : (a) one who is intoxicated, insane or imbecile, under duress, or not in his senses due to anger, sudden calamity, old age or sickness; (b) a person in death-sickness or in a condition which in all probability is fatal and of which he actually dies, survived by his wife.

36. A divorce which does not take effect forthwith, or is conditional, or is used as an oath, shall not be operative.

37. (1) The husband can divorce his wife thrice.

(2) Where a talaq is coupled with a number, express or implied, not more than one divorce shall take place.

(3) If a woman is divorced thrice on three separate occasions by her husband ,it will result into *bainuna kubra*—'great parting'.

38. Divorce may be of two kinds:

(i) revocable;when this occurs the husband is permitted to resume marital relations with the wife during the *'idda* period without a remarriage (resumption of relation shall be proved in the same way in which divorce is to be proved);

(ii) irrevocable : which is of two kinds; (a) "small parting"— which means that the husband is permitted to remarry the divorced wife by a new contract ; and (b) "great parting"— which means that the husband is forbidden to marry the woman whom he has divorced on three different occasions followed by expiry of *'idda*.

39.(1) When a person intends to divorce his wife,he shall institute a suit in the Court of Personal Status requesting that it be effected and that an order be issued therefor. If a person cannot so approach the court, registration of the divorce in the court during the period of *'idda* shall be binding on him.

(2) The certificate of marriage shall remain valid till it is cancelled by the court.

40. Either spouse can seek a judicial divorce on any of the following grounds:

(i) where the other party has caused injury making continuance of marital life impossible;

(ii) where the other spouse has committed matrimonial infidelity (homosexuality on the part of the husband being an instance of such infidelity);

(iii) where the marriage took place before either party attained the age of eighteen years, without the consent of the qadi;

(iv) where the marriage took place outside the court by compulsion, followed by consummation;

(iv-a) where the husband has become addict to alchohol, durgs or gambling.

(v) where the husband has married again without the permission of the court; in such a case there will be no right for the wife to lodge a criminal prosecution under article 3(I) (a) of the Criminal Procedure Code 1971 (Law 23 of 1971) on the basis of article 3(6) of this Code.

41. (1) Either spouse can seek a judicial divorce if there is a discord between them whether before or after consummation.

(2) The court shall investigate into the causes of discord and, where it is proved, shall appoint one arbitrator from the family of the wife and another from the husband's family. They will try to reconcile the parties if it is possible. The court may seek nomination of the arbitrators by the spouses, and if they cannot agree, shall itself appoint arbitrators.

(3)The arbitrators shall make efforts to effect a reconciliation and ,if they fail, shall refer the matter to the court indicating the party with whom the fault lies. If they differ the court may name a third arbitrator.

(4) (a) Where the court is satisfied that the discord is continuing between the spouses, but cannot effect a reconciliation between

them while the husband refuses to divorce the wife, it shall dissolve the marriage.

(b) Where divorce takes place after consummation deferred dower shall lapse if the fault lies with the wife—whether she is the petitioner or the respondent. If she has already received the whole of dower, she must return half of it .Where the fault lies with both the parties, deferred dower shall be divided between them in proportion to their respective faults.

(c) Where divorce takes place before consummation and the fault lies with the wife, she must return what has been paid to her out of the prompt dower.

42. Where a petition for divorce on any of the grounds mentioned in article 40 of this Code is dismissed due to want of proof and the order of dismissal is final, if a fresh petition if filed for divorce on substantially the same grounds the court may refer it for arbitration in accordance with article 41.

43. (1) The wife can seek divorce in any of the following cases:

(i) where her husband has been sentenced to imprisonment for three years or more—even though he has property from which maintenance can be obtained;

(ii) where the husband has deserted his wife for two years or more without a reasonable ground, even if he is in a known place and has property from which maintenance can be obtained.

(iii) where the husband does not send for the wife for consummation of marriage until after two years since its date (his doing so without being in a position to fulfil her matrimonial rights having no legal recognition);

(iv) where the husband is impotent or is suffering from such a defect that makes cohabitation impossible, whether for physical or psychological reasons, or if he develops such a defect after consummation and the prescribed medical board certifies that it is incurable—if the court finds that the reason for this is psychological, it can postpone divorce for a period of one year with the condition that the husband must cohabit within that period;

(v) if the husband is sterile or develops sterility after marriage so that he can never beget a child on her;

(vi) where the wife finds after marriage that her husband is suffering from a disease that makes co-living injurious —e g.,

leprosy, leucoderma, siphilis or insanity, or where he develops such a disease later; if the court concludes on the basis of medical evidence that the illness is curable it shall defer divorce and direct the wife to keep away from him during the respite; and if the disease is not cured for a long period and the husband denies talaq while the wife insists on it, the qadi can grant the same;

(vii) where the husband refuses to pay her maintenance without a legal reason after having been given a respite for a period of at least sixty days;

(viii) where she cannot obtain maintenance from the husband due to his absence, disappearance, hiding or imprisonment for a period exceeding one year;

(ix) where the husband refuses to pay accummulated arrears of maintenance which he has been directed to pay, after the Execution Department gives him a respite for a period of at least sixty days.

(2) The wife shall have a right to seek divorce before consummation; in such a case the court shall grant a divorce after she has returned to the husband all that she has received as dower and maintenance and the money proved to have been spent for the purpose of marriage.

44. Grounds of divorce may be proved by all means of evidence, including oral evidence, to be admitted by the court—except matters for which the law has prescribed particular means of evidence.

45. A divorce granted under articles 40 to 43 shall effect an irrevocable talaq with room for direct fresh marriage.

46. (1) *Khul'* terminates the bond of marriage when effected by the use of the word *khul '* or any other word having that meaning; it should be effected by means of proposal and acceptance in the presence of the qadi, subject to the provision of article 39 of this law.

(2) It is a condition for the validity of *khul'* that the husband should have capacity to pronounce a divorce and the wife be the proper object of a divorce. A *khul'* shall effect an irrevocable divorce.

(3) A husband can agree to *khul'* in consideration of an amount less or more than the dower.

49. *'Idda* begins immediately after divorce, dissolution of marriage or death, as the case may be, even if the woman is not aware of the cause of the same.

50. Maintenance of *'idda* for a divorced wife is obligatory on the living husband, even if she is not obedient; but there is no maintenance during *'idda* of death.

52. (1) Acknowledgement of filiation, even if made during death-sickness, for a child of unknown paternity, shall establish the lineage so acknowledged, when the child resembles its 'equals'.

(2) Acknowledgement by a wife, or a woman observing *'idda* shall not establish paternity unless confirmed by the husband or otherwise proved by evidence.

56. The cost of the child's fosterage is like that for food and shall be binding on the person responsible for its maintenance.

57. (1) The mother has the preferential right to the custody and upbringing of the child during the subsistence of marriage as well as after its dissolution, if it is not injurious to the child.

(2) The custodian-mother must be major, sane, trustworthy, capable of bringing up and protecting the child, and not married to a stranger to the child.

(3) If the custodian-mother has a dispute regarding her remuneration for custody or maintenance of the child, the court shall decide it. No remuneration small be ordered during subsistence of marriage or during *'idda* of a revocable talaq.

(4) The father shall look after the child's upbringing and education till he completes the age of ten years. The court can permit extension of mother's custody until it completes the age of fifteen years if it concludes, after reference to the prescribed medical and people's agencies, that the child's interest demands that it should live with none else but the mother.

(5) When the child completes the age of fifteen years it shall have the option of living with either parent or any other relative until the completion of eighteen years of age.

(6) A female custodian whose right to custody is terminated by a court-order must hand over the child to the person to whom it has been awarded.

(7) Where the mother of the child does not fulfil the conditions of custody or is dead, the custody shall pass on to the father except when it is against the child's interest.

(8) Where either parent does not have the capacity to claim custody, the court shall entrust the child to a trustworthy female custodian.

(9) If the child's father is dead or does not fulfil any of the conditions of custody and the child remains with its mother who fulfils the conditions of custody, no male or famale relative shall have the right to dispute this until the child becomes major.

(9-a) A mother who is working shall not be disqualified for custody on that ground, unless it is contrary to child's interest.

59. (1) If a child has no property of its own, its maintenance is binding on its father, unless his own financial condition is unsatisfactory .

(2) Maintenance of children shall be provided—in case of a daughter till she is married, and in case of boys till they reach the age in which their 'equals' earn for themselves, unless a boy is at school.

(3) A major son who is incapable of earning is like a minor child.

61. Maintenance of poor parents is binding on well-to-do children, old or young ,provided that it does nor appear that the father is unreasonably insisting on sitting idle.

67.The legator must be competent to make a gift and must be the owner of what he bequeaths.

68. It is necessary for the legatee that: (i) he must be alive, in fact or in law, when the bequest is made and when the testator dies [a bequest in favour of a juristic person shall be valid, as also in favour of charitable institutions and philanthropic establishments]; (ii) he must not have killed the legator.

70. Bequest of more than a third of the estate is not permissible except by consent of the heirs; the state shall be recognized as the heir of one who has no other heirs.

74. (1)Where a child, male or female, dies before its father or mother it shall be presumed to be alive at the time of his or her death, and its entitlement in the estate of the deceased shall pass on to its male and female children, as per the principles of law, to be regarded as an obligatory bequest, without exceeding a third of the estate.

(2) The obligatory bequest referred to in clause (1) above shall take priority over other bequests in disposing of one-third of the estate.

88. Persons entitled to the property of the deceased may be of the following four categories: (i) heirs by relationship and by valid marriage,(ii) acknowledged kinsmen; (iii) universal legatee; and (iv) public treasury

89. (1) Heirs by consanguinity and their position as to right of inheritance, are: (i) parents and children how low soever—according to the rule of 'double share for the male'.

(1) grandparents, brothers and sisters, children of brothers and sisters,(iii) paternal and maternal uncles and aunts; and uterine heirs.

(2) Sisters by full blood shall be treated as brothers by full blood in the matter of exclusion from inheritance.

90. Subject to the foregoing provisions, the distribution of property among the heirs by relationship shall be made in accordance with the rules of the Shari'ah which were followed before the enactment of the Law of Personal Status No.188 of 1959,as shall also be the case in regard to the rest of the provisions relating to inheritance.

91.(1) The husband is entitled, in the presence of a child of his wife, to a fourth, and in the absence of a child, to a half. Where the wife survives the husband, she is entitled to one-eighth in the presence of a child and, in the absence of a child to a fourth.

(2) A daughter or daughters in the absence of a son of the praepositus shall have a right to the remainder of the estate after the parents and the surviving spouse take their shares; and in their absence they will take the whole estate.

Law on Divorced Wife's Right to Residence 1983

[Law 77 of 1983 as amended in 1988]

1. The court which decides a petition for talaq of the wife or dissolution of her marriage shall, on her application, order that after divorce or annulment she will continue living, without her husband, in the house or flat in which she was living with him, if it is owned by him. The order shall be passed as a part of the decree of divorce or dissolution of marriage.

2. (1) The divorced wife can retain the residence in accordance with article 1 for a period of three years without consideration subject to the following conditions:

(a) that she does not rent out the house wholly or partly;

(b) that nobody shall live in it with her except a child under her legal custody ;

(c) that she will cause no damage to the house or the flat except the usual depreciation caused by normal habitation.

(2) As an exception to clause (1)(b) above the wife may keep with her any of her close relatives subject to the condition that no woman who has passed the age of legal custody from amongst those related to her husband shall live with her in the house or the flat.

3. The wife shall be deprived of this right in the following cases:

(a) If the divorce or dissolution of marriage has taken place due to her infidelity or disobedience; (b) where she has agreed to divorce or dissolution of marriage;(c) where divorce has been obtained as a result of *khul'* ; (d) where she independently owns a house or a flat.

4. When an order has been passed for the divorced wife's retention of the house or flat, it shall be executed by the Execution Department. The department shall evict the husband and those who are not permitted to live with her for a period of three years from the date of eviction.

5. If the divorced wife violates any of the conditions laid down in article 2 the husband can file a suit for the vacation of the house or the flat and its vacant possession. Where such an order of vacation has been passed she will have no right to claim possession for the rest of the period in terms of this law.

6. Where the husband delays vacating the house after being directed for the same by the Execution Department, the principles of execution shall apply and the executor of court -decrees can impose a punishment by way of fine of one hundred dinars for each day of delay.

7. This law will apply even if the husand has made a gift of the house to which the wife is entitled hereunder for residence, or has created an endowment on it.

JORDAN

Code of Personal Status 1976

[Law 61 of 1976 as amended by Law 25 of 1977]

2. Marriage is a contract between a man and a woman which legalises establishment of family and procreation of children.

3. No marriage shall come into existence by mere engagement or promise or by recitation of *fatiha* or by taking possession of anything on account of *mahr* or by acceptance of a gift.

4. Every promisor and promisee under an engagement can cancel the engagement.

5. For the capacity to marry it is a condition that both the parties must be sane and that the groom should have completed the age of sixteen years and the bride the age of fifteen years.

6. (1) Where a virgin girl who has completed the age of fifteen years wants to marry a man without violating the principal of *kuf* (equality in marriage) but her guardian other than her father or grandfather does not give consent without a legal ground, the court can allow the marriage.

(2) Where a girl applies for dispensation of the consent of her father or grandfather, her application shall not be accepted except where she has completed the age of eighteen years or the objection of the father or grandfather is for no legal reason.

7. The marriage of a girl who has not completed the age of eighteen years with a man who is older than her by more than twenty years shall not be permitted except when the court has ascertained her free consent and finds that it is clearly in her interest.

8. The court can permit the marriage of an insane or a mentally sick person if it is satisfied by medical evidence that the marriage is to his or her manifest advantage.

9. The 'agnates in their own right' shall be the marriage-guardians in the order laid down according to the dominant opinion in the Hanafi school of law.

10. The guardian must be sane and major and where the bride is a Muslim he must also be a Muslim.

11. The consent of any of the guardians will overrule the objection of the other guardians if all are of the same degree; and the consent of a remote guardian in the absence of a near guardian will cancel the right of objection of guardian who is absent; the consent of the guardian is acceptable when he has given it in express terms.

12. Where the nearer guardian is absent and it is not in the interest of the bride to wait for him, the right to guardianship will

get transferred to the guardian next in order. If he expresses his inability to act as the guardian, it gets transferred to the next in line in the same way. If such a transfer is not possible the right of guardianship will be transferred to the court.

13. For the marriage of woman who is a *thayiba* (formerly married)and sane and has completed the age of eighteen years the consent of guardian is not necessary.

14. Marriage shall be solmnized by the offer and acceptance of the parties or their agents made in the marriage function.

17. (1) It shall be obligatory for the groom to approach the qadi or his deputy for the solemnization of marriage.

(2) The official authorished by the qadi shall register the marriage and issue a certificate of marriage. The qadi can charge a fee in exceptional circumstances with the permission of the Grand Qadi.

(3) Where a marriage has taken place without registration the person who solemnizes the marriage, the parties and the witnesses shall be liable to punishment as laid down under the Jordanian Penal Code and to fine not exceeding one hundred dinars.

(4) An official who does not register the marriage after the completion of the ceremony shall be liable to punishment laid down in the foregoing clause and shall also be liable to be dismissed.

(5) The qadi shall appoint the marriage officials in consultation with the Grand Qadi and the Grand Qadi shall issue regulations for their functioning.

18. A marriage which is to become final on some future happening or is based on an uncertain condition shall not be lawful.

19. Where in the contract of marriage has been stipulated a condition for the benefit of either party which is not prejudicial to the objects of marriage and requires no action forbidden by the law, and which has been recorded in certificate of marriage, compliance with it shall be obligatory, as follows:

(1) Where the wife has stipulated for something that gives her a right not forbidden by law and not affecting a third person's right—e.g., that she will not be required to go out of station, or that the husband shall not marry another woman, or that she can divorce herself should she so desire, or that she would live in

specified place—the condition is valid and obligatory and if the husband does not fulfil it the wife can apply for a divorce on that ground without losing any of her rights resulting from marriage.

(ii) Where the husband has stipulated for something that gives him a right not forbidden by the law and not affecting a third person's rights—e.g., if he stipulates that she will not go out for work or that she will live with him at his place of work— the condition is valid and obligatory, and if the wife does not comply with it the marriage may be dissolved at the instance of the husband who will be absolved of his liability for her deferred dower and maintenance of *'idda*.

(iii) Where the contract of marriage contains a condition which is repugnant to the object of marriage or requires an action forbidden by law—e.g., where either party stipulates that they will not live together or that the other party must drink alcohol or must not meet either of his or her parents—the condition will be void but the marriage will be lawful.

20. It is essential for the validity of marriage that the man should be financially equal to the woman and capable of paying her prompt dower and maintenance. Equality shall be looked into at the time of marriage and if it disappears after the marriage it shall have no effect on the marriage.

32. The marriage contract shall be valid and have the effect of a valid marriage if the following conditions are fulfilled: (a) a Muslim woman shall not marry a non-Muslim; (b) a Muslim man shall not marry a non-*kitabiya;* (c) the parties shall not be within prohibited degrees in marriage specified in articles 24-26 of this Code.

35. In the case of lawful marriage wife's right to *mahr* and maintenance and mutual rights of inheritance between the parties will be established.

36. The husband shall provide to the wife a house having in it all things required by the law in accordance with his financial position at his place of residence or work.

37. A wife who has been paid her prompt dower shall obey her husband and live in his house and go with him wherever he goes even if out of the country, provided that her safety is assured and no condition to the contrary has been registered in the certificate of marriage .Where she refuses to obey him, her right to maintenance will lapse.

38. The husband cannot accommodate with his wife in the same house his family members and relations or grown-up children. Indigent incapable parents will be exempt from this restriction if they cannot be separately maintained. Similarly, the wife cannot accommodate in the home her children from another husband or other relations without husband's consent.

40. One who has more than one wife shall treat them with equality and shall not accommodate them in the same house except with their consent.

45. It is lawful to make the *mahr* prompt or deferred—the whole or part of it—as specified in the certificate of marriage. When it is not so specified to be deferred, it shall be regarded as prompt.

55. Where divorce takes place before *mahr* is stipulated or before consummation of marriage or presumptive consummation, *mut'a* will be obligatory; and *mut'a* will be fixed up in accordance with custom and usage and in conformity with the husband's position but shall not exceed half of proper dower.

67. Wife's maintenance is obligatory, even if she is of different religion, from the time of lawful marriage, though she may be living with her family except when the husband wants her to join him and she refuses to do so without a lawful reason; she will have the right to refuse to join him if he has not paid her prompt dower or has not provided a house for her as required by law.

68. There shall be no maintenance for a wife who goes out to work without her husband's consent.

78. Maternity expenses at the time of delivery of child shall be paid by the husband as per usage and in accordance with his position—whether or not the marriage is intact.

79. The husband shall have to pay maintenance to the divorced wife during her *'idda* in the case of talaq, judicial divorce and dissolution of marriage.

88. (i) Talaq shall not be effective if pronounced under intoxication, bewilderment, compulsion, mental disorder, depression or effect of sleep.

(ii)'Bewildered' is one who has lost senses due to anger or provocation, etc, and cannot understand what he is saying.

89. An unintentional divorce meant to persuade or dissuade the wife for or from something shall have no effect.

90. A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.

94. Every divorce shall be revocable except the final third, one before consummation and one with consideration.

97. A revocable divorce does not dissolve the marriage immediately. The husband has the right to revoke it during *'idda* by words or conduct, and this right does not lapse by rejection and does not depend on the wife's consent. No new dower becomes due on revocation.

98. Where an irrevocable talaq was pronounced once or twice, renewal of marriage with the consent of parties is not prohibited.

101. The husband must register his divorce with the qadi. Where he has divorced his wife outside the court and does not register within fifteen days, he must apply to the Shari'ah court for registration of talaq. Violation of the rule shall be punishable under the Jordanian Penal Code.

103. Either party can revoke the offer of *khul'* before the other party accepts it.

108. Maintenance of *'idda* shall not lapse except if expressly specified otherwise in the agreement on *khul'*.

113. A woman free from all defects hindering cohabitation can seek annulment of the marriage if her husband is suffering from any such defect.

114. A woman who knew of such a defect, other than impotency, before the marriage, or has wilfully lived with her husband after knowing it, will have no right to seek annulment of marriage on that ground.

116. Where a woman finds, whether before or after consummation that her husband is suffering from such a disease that may be injurious to her if she cohabits with him, e.g., leprosy or a venereal disease, and approaches the qadi for dissolution of her marriage, the qadi shall seek opinion of experts. If he is told that the disease is not likely to be cured, he will dissolve the marriage immediately. And if the disease is reported to be curable he will postpone action for one year and if after the lapse of that period the disease remains uncured, while the woman insists on divorce, he will dissolve the marriage.

123. Where the husband has deserted his wife for one year or more without any reason, the wife may claim dissolution of marriage on that ground even if he has left behind property from which she can obtain maintenance.

130. Where the husband has been imprisoned for three years or more, the marriage may be dissolved after one year from the date of commencement of punishment, even though there be property from which the wife can obtain maintenance.

134. If a husband has arbitrarily divorced his wife without a reasonable ground, she can apply to the court for *ta'wid* (compensation), whereupon the court may grant compensation not exceeding one year's maintenance, in addition to maintenance of *'idda;* and depending on his financial condition the husband may be asked to pay it in a lump sum or in instalments.

145. For a divorced wife entitled to maintenance of *'idda* the same shall be regarded as a debt against the husband from the date of divorce in accordance with the provision of article 80 of this Code.

148. The child of a wife whose marriage is valid or irregular, if born after six months or more from the date of consummation of marriage, actual or presumptive, will be of proven legitimacy;and where a child is born after separation, its paternity shall not be proved unless it is born within one year from the date of separation.

152. The mother of an infant shall have no right to claim remuneration for suckling during the subsistence of marriage or during *'idda* of a revocable divorce; but she will have the right to claim remuneration during the *'idda* of an irrevocable divorce and after the expiry of *'idda* in every case.

156. The right of the mother-custodian to custody shall be lost on her remarriage to a person not closely related to the child.

160. The mother shall have no right to claim remuneration of *hadana* during the subsistence of marriage or during *'idda* of a revocable divorce.

169. As regards children whose maintenance is obligatory for their father, their maintenance will include expenses of education at all levels—primary, secondary and higher—provided that the child is capable to study in accordance with the resources of the father.

172. Affluent children, both male and female, shall be bound to provide maintenance to their parents who are indigent and cannot earn for themselves.

179. If a woman after the declaration of death of her husband marries again and thereafter the first husband turns out to be alive, the second marriage will be annulled if it has not been consummated.

180. For uterine brothers and sisters there shall be a share of 1/6 for a single claimant and 1/3 for two or more males among them; and full or consanguine brothers shall share this 1/3 with them if the Qur'anic heirs exhaust the estate.

181. (a). Where the Qur'anic heirs do not exhaust the estate and there are no consanguine agnates to take the residue, the same shall revert by "return" to the Qur'anic heirs in proportion to their shares.

(b) The residue of the estate shall go to the surviving spouse if there is no agnate or distant kindred.

182. If a person dies and his son has died before or with him leaving behind his own children, there shall be obligatory for such grandchildren out of 1/3 of his legal estate a bequest of the amount as specified below:

(a) the obligatory bequest for such grandchildren shall be equivalent to the share that their father would have got in the estate if he were alive; but it shall not exceed one third of the estate;

(b) such grandchildren will not be entitled to the bequest if they are heirs of their father's ascendants, grandfather or grandmother; or where he has bequeathed or gifted to them in his life time what they are entitled to by way of such bequest—where he has bequeathed to them less than that, the balance shall be due, and if he has bequeathed more than that, the excess shall be regarded as an optional bequest; and if he has bequeathed to some of them only, others shall be given their due;

(c) the bequest shall be for son's children and son's son's children how low soever, one or more, subject to the rules of 'double share for males' and exclusion by each ascendant of his descendants but not of another; and each descendant gets the share of his ascendant only;

(d) such obligatory bequest shall take priority over optional bequests in the disposal of one-third of estate.

Dissolution of Muslim Marriages Act 1939

[*Act 8 of 1939 as amended by Act 25:1942—also applicable in Pakistan as amended by Ordinance 8:1961 and in Bangladesh as amended by that Ordinance & Ordinance 25 of 1986*]

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for the maintenance for a period of two years;

[*Pakistan -Bangladesh* : (ii-a) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance 1961;]

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform without reasonable cause his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years of is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen [*Pakistan:16; Bangladesh : 18*] years repudiated the marriage before attaining the age of eighteen years[*Bangladesh*:19 years]; provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say — (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-

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